SUPREME COURT, U. S.
FILED
DEC 10 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-910

RICHARD T. SPENCE and wife,
FRANCES HAWKINS SPENCE, and
RONALD KENNETH SPENCE,

Petitioners,

v.

SUSAN DURHAM SPENCE,
JAMES ROBERT DURHAM and wife,
FAYE MUNDY DURHAM,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

EUGENE H. PHILLIPS
2219 Wachovia Building
Winston-Salem, N. C. 27101
Counsel for Petitioners

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF FACTS	4
ARGUMENT	8
A. Incidental and Preliminary Matters	8
B. Full Faith and Credit Denied Before Hearing and Trial	12
C. Full Faith and Credit Denied at Trial	13
CONCLUSION	16
APPENDIX	
Order, Forsyth County, North Carolina, District Court (5-14-71)	1a
Order, Forsyth County, North Carolina, District Court (7-20-71)	3a
Judgment, Forsyth County, North Carolina, District Court (1-11-72)	5a
Opinion, Court of Appeals of North Carolina, (10-25-72)	14a

Page

Opinion, Supreme Court of North Carolina, (8-31-73) 18a

Concurring Opinion, by Mr. Justice Higgins, Supreme Court of North Carolina, (8-31-73) 40a

Dissenting Opinion, by Mr. Justice Lake, Supreme Court of North Carolina, (8-31-73) 44a

Judgment, Superior Court, Cobb County, Georgia, (6-2-69). 65a

Order, Superior Court, Cobb County, Georgia, (8-23-71) 74a

Opinion, Supreme Court of Georgia, (1-6-72) 76a

TABLE OF CITATIONS

Cases:

Cleland v. Cleland, 249 N.C. 16, 106 S.E.2d 114 (1958) 10

Ford v. Ford, 371 U.S. 187, 83 S.Ct. 273, 9 L.Ed. 240 (1962) 11, 13

Halvey v. Halvey, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 10

Holmes v. Holmes, 211 Ga. 827, 89 S.E.2d 194 (1955). 10

Kovacs v. Brewer, 356 U.S. 604, 78 S.Ct. 963 2 L.Ed.2d 1008 (1958) 11, 14, 16

Page

In Re Marlow,
268 N.C. 197, 150 S.E.2d 204 (1966) 10

Rothman v. Rothman,
6 N.C. App. 401, 170 S.E.2d 140 (1969) 14

Constitutional Provisions, Statutes, and Texts Cited

Lee, North Carolina Family Law, Section 226. 14

28 U.S.C. §1257 4

U.S. Constitution, Article IV, §1 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

RICHARD T. SPENCE and wife,
FRANCES HAWKINS SPENCE, and
RONALD KENNETH SPENCE,

Petitioners,

v.

SUSAN DURHAM SPENCE,
JAMES ROBERT DURHAM and wife,
FAYE MUNDY DURHAM,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The petitioners Richard T. Spence and wife Frances Hawkins Spence and Ronald Kenneth Spence pray that a writ of certiorari issue upon their behalf from the final decision of the Supreme Court of North Carolina, affirming the judgment of the Forsyth County, North Carolina, District Court, which abrogated petitioners' rights under a judgment previously entered by the Cobb County, Georgia, Superior Court, contrary to the full faith and credit clause of the constitution.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 283 N.C., 671, 198 S.E.2d 537; the opinion of the Court of Appeals of North Carolina is reported at 16 N.C. App. 372, 191 S.E.2d 908; the opinion of the Supreme Court of Georgia is reported at 228 Ga. 529, 186 S.E.2d 723. The judgments and orders of the Forsyth County, North Carolina, District Court and the Cobb County, Georgia, Superior Court are not reported.

JURISDICTION

Jurisdiction in this court is invoked under Title 28 Section 1257(3) of the United States Code. The final order and judgment in the case of the petitioners was rendered by the Forsyth County, North Carolina, District Court on the 11th day of January, 1972. Appeal therefrom was taken to the Court of Appeals of the State of North Carolina, which reversed the judgment of the Forsyth County, North Carolina, District Court on the 25th day of October, 1972. The Supreme Court of North Carolina thereafter granted certiorari and on the 31st day of August, 1973, reversed the decision of the Court of Appeals, thereby reinstating and affirming the judgment of the Forsyth County, North Carolina, District Court. The Supreme Court of North Carolina, in reversing the Court of Appeals and reinstating the judgment of the District Court, was not unanimous. Mr. Justice Lake, one of the most erudite judges and law teachers in the State's history, dissented from the principal opinion, showing that the matters controverted in this case had already been adjudicated in a prior action between the same parties in the Cobb County, Georgia, Superior Court, wherein judgment was entered

June 2, 1969; and that the petitioners' rights under that judgment were denied full faith and credit by the North Carolina Supreme Court and the Forsyth County, North Carolina, District Court.

QUESTIONS PRESENTED

Was the Georgia judgment, in prior proceeding between the same parties, placing children in custody of North Carolina grandparents during school months and Georgia grandparents during summer, and denying custody to morally irresponsible and lesbianistic mother and forbidding her to be alone with the children, deprived of full faith and credit by North Carolina District Court, which

> (1) before trial, and without hearing evidence, upon mother filing new custody action, altered judgment terms by pendente lite orders forbidding the children's return to Georgia grandparents as scheduled, and placing children in mother's custody until the case was tried several months later?
>
> (2) at trial, erroneously re-litigated the case in its entirety, improperly concluding that mother had been morally fit at all times, and that, in all events, circumstantial changes since the judgment's entry required that mother be given custody – when changes established by evidence were not in her moral character, but merely in her acquiring North Carolina residence for the purpose of re-trying the case, and in her having custody pending trial, contrary to the judgment terms?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. §1257

State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

By writ of certiorari . . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . . June 25, 1948, c. 646, 62 Stat. 929.

U. S. CONSTITUTION

Article IV – Full faith and credit

§1 Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.

STATEMENT OF FACTS

Faye Frances Spence, now eleven years old, and Dianna-Jeannene Spence, now nine years old, are the daughters of the petitioner Ronald Kenneth Spence and the respondent Susan Durham Spence; and they are the granddaughters of the petitioners Richard T. Spence and Frances Hawkins Spence and the respondents James Robert Durham and Faye Mundy Durham. On the 2nd of June, 1969, when Faye Frances was seven years old and Dianna Jeannene was five, in an action involving the same parties as this case, the Superior Court of Cobb County, Georgia entered judgment, not only denying custody of the children

to respondent Susan Durham Spence, but permitting her to visit them only in the grandparents' home and positively forbidding her to take them from the home. The judgment placed the children in the exclusive custody of the grandparents – the Spence grandparents during the three summer months and the Durham grandparents during the rest of the year. (65a-72a).

These drastic provisions were ordered by the Georgia court and consented to by all the parties, because it was established during the several months of discovery and preparation that both parents were morally irresponsible and unfit – the petitioner Ronald Kenneth Spence, among other things, for carrying on a liaison with a teenaged baby sitter in the marriage bed, with the knowledge, observation and procurement of the respondent Susan Durham Spence; and the respondent Susan Durham Spence, because of her lesbianistic advances upon and relationships with several young girls, including the teenaged baby sitter, and because of her part in promoting and condoning the illicit relationship between her husband and the baby sitter. (74a, 75a).

In 1969, the children, both parents, and the Spence grandparents were all residents of Georgia and the Durham grandparents were residents of North Carolina. The jurisdiction of the Georgia court over the children and all the parties was obtained when the petitioner Ronald Kenneth Spence sued the respondent Susan Durham Spence for divorce and custody of the children; the respondent Susan Durham Spence answered and counterclaimed for alimony and custody; and both sets of grandparents, with the court's approval, intervened in the proceeding, asking that the children be placed in their custody. The Durham grandparents, being North Carolina residents, gave bond in

the amount of $10,000 to assure their compliance with the terms of the judgment and that the children would be returned periodically to the Spence grandparents in Georgia. (65a – 72a, 76a, 77a)

This divided custody arrangement worked very well for almost two years, there being no suggestion that the children were not well cared for when in the care of both sets of grandparents; however, as early as March, 1971, the respondent Susan Durham Spence, having moved to North Carolina a few months earlier for the express purpose of establishing residence and re-litigating the custody of the children, was being permitted by her parents to have the children in her apartment, in defiance of the Georgia decree. (74a, 75a, 80a-81a)

Just a week before June 1st, 1971, when the children were to be returned to the Spence grandparents, as required by the Georgia judgment, the respondent Susan Durham Spence brought this proceeding in the Forsyth County, North Carolina, District Court to obtain custody of the children. And, nothwithstanding the terms of the Georgia judgment, expressly incorporated in her complaint by reference, the Forsyth County District Court immediately issued an order forbidding the children's return to Georgia, and scheduled a trial ten days thereafter – though none of the other parties had even been served with process at that time. (1a, 2a)

The trial was continued, but for only a short time – though the Spence grandparents had not been served with lawful process, the case was obviously in its preliminary state, numerous depositions in California and elsewhere had to be taken, and no urgency existed in regard to the children, whose needs had been well attended to when with both sets of grandparents. And when respondent

Ronald Kenneth Spence requested time to prepare the case for trial, the Forsyth County District Court issued still another order pendente lite, granting a continuance, but giving custody of the children during the interim to the respondent Susan Durham Spence, in direct violation of the terms of the Georgia judgment. And, pursuant thereto, she had the children in her custody for the next six months, until the case was tried. (3a, 4a)

When trial was eventually had, respondents, with the court's approval, collaterally attacked the Georgia judgment and their consent to it, and the Forsyth County court adjudged that the allegations and evidence before the Georgia court were without basis and that she was, in all respects, fit to have custody of the children. The court also adjudged, however, that if the Georgia judgment was valid and the allegations and evidence before it were true, that changes had occurred since then, requiring that the children be placed in her custody. (5a-13a)

But no evidence was before the court showing any changes had occurred in her character or morality, the principal changes shown by the evidence being only of respondent's residence and employment, which were immaterial, because she had a good job and a good apartment when the case was adjudicated in Georgia.

Upon appeal, the North Carolina Court of Appeals reversed the judgment of the Forsyth County District Court, ruling that the Georgia judgment was valid and entitled to full faith and credit, and that the purported changes found by the trial court were not supported by evidence. (14a-17a)

Certiorari being granted by the Supreme Court of North Carolina, a majority of that court, though ruling that the Georgia judgment was, indeed, valid, reversed the Court of Appeals and reinstated the judgment of the trial court, holding that a change of circumstances warranting the change of custody was established by the evidence. (18a-40a)

But, as though doubting its own declaration, the majority of the North Carolina Supreme Court modified the judgment by requiring the Forsyth County District Court to periodically inquire into and investigate the status and activities of the respondent Susan Durham Spence. (39a)

Mister Justice Lake of the North Carolina Supreme Court dissented, showing that no real change of circumstances had occurred and that the central issue was respondent's character and morality, not her office or residence address. (44a-65a)

The full faith and credit issue was raised by the petitioners in their pleadings, and was reiterated at trial and before both appellate courts

From the final judgment of the North Carolina Supreme Court, the petitioners now seek a writ of certiorari from this Court.

ARGUMENT

THE NORTH CAROLINA COURT DENIED THE GEORGIA JUDGMENT FULL FAITH AND CREDIT

A. Incidental and Preliminary Matters

The narrow issues raised by this petition might be readily understood and resolved by first noting various matters

related to them that are no longer disputable –either because they have been resolved or are now free of doubt.

First, the validity of the Georgia judgment has been set at rest. Though the judgment's supposed invalidity was the principal ruling made by the trial court – and was the respondents' main contention before both appellate courts – all the judges of the highest courts of both Georgia and North Carolina have ruled that the judgment was valid. As well they might, since it is obvious that: all the parties were properly before the Georgia court for several months and were represented from outset to conclusion by counsel; the judgment complied in all respects with the laws of Georgia, was rendered after the children's situation and needs had been investigated, and after "the judge was apprised of the evidence the parties were prepared to offer," and detailed findings, the absence of which was complained about later by the respondents, were "purposefully omitted from the judgment," at the behest of the parties, and out of deference to the children and the grandparents; the parties were completely adversary, a parent and one set of grandparents on each side, and were those most closely related to the children and that were legally responsible for them, either because they were parents, or because they voluntarily assumed responsibility with the court's approval; yet all the parties, through their lawyers, consented to the judgment, and the respondents Durham personally acknowledged the judgment's validity by giving bond to assure their compliance with its terms, and respondent Susan Durham Spence personally acknowledged the judgment's validity in the complaint filed in this case; and all parties adhered to the judgment terms for two years. (14a-17a, 35a, 41a, 44a, 76a-82a)

Second, it is indisputably the law that: since the Georgia judgment controls the custody of children, its terms are not necessarily final and absolute, but can be modified as changing circumstances affecting the children's welfare require, not only by the Georgia court, but also by any other court that has jurisdiction of the children; and, finally, that the North Carolina court unquestionably had jurisdiction of these children, they having been in the State for several months before suit was brought. *Holmes v. Holmes,* 211 Ga. 827, 89 S.E. 2d 194 (1955). *In re Marlow,* 268 N.C., 197, 150 S.E. 2d 204 (1966); *Cleland v. Cleland,* 249 N.C., 16, 106 S.E.2d 114 (1958); *Halvey v. Halvey,* 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133. All judges, trial and appellate, that have considered this case, have so held, petitioners have never contended otherwise, and to further belabor these inherent and obvious propositions would be pointless.

But that this custody judgment – (and, indeed, all custody judgments) – is or was subject to alteration and revision, as the changing needs and situations of the children require, does not gainsay the truth of any of the following additional propositions that are likewise inherent and obvious:

1. The divorce and custody proceeding in the Cobb County, Georgia Superior Court was a "judicial proceeding of another state."

2. The full faith and credit clause of the Constitution protects the "judicial proceedings" of other states, and contains no phrase or word excluding child custody cases therefrom.

> 3. The circumstantial changes affecting the well-being of children, which warrant a court in one state altering and disturbing the terms of a judgment previously entered in another state, are only those real and substantial changes that are established JUDICIALLY; which is to say, by evidence after "hearing," as such judgments cannot be altered by fiat or whim, when no change at all has been established and cannot be altered because of changes that are established when those "changes" are immaterial, insubstantial and superficial.

All of which is merely to say that custody cases are not and cannot be beyond the pale of full faith and credit and the rule of law. And it is no matter that this Court has not yet found it necessary to categorically say so. *Kovacs v. Brewer,* 356 U.S. 604, 78 S.Ct. 963, 2 L.Ed. 2d 1008 (1958); *Ford v. Ford,* 371 U.S. 187, 83 S.Ct. 273, 9 L.Ed. 240 (1962). Truth is none the less so because it has not yet been officially proclaimed and recorded.

Which leads us to this case. Because the North Carolina court did render the Georgia judgment completely inoperative, and not JUDICIALLY upon evidence, but by unadulterated fiat – initially without hearing or evidence, and ultimately by relying on "changes" that were either established by the court's own arbitrary disregard of the judgment terms, or that were superficial and inconsequential.

B. Full Faith and Credit Denied Before Hearing and Trial

Under the provisions of the Georgia judgment, the respondent Susan Durham Spence was not only denied custody of these little girls, she was permitted to visit the children only in the home of the grandparents and was expressly prohibited from taking them from the home. The judgment also required the respondents Durham to return the children to Georgia and the care and custody of the petitioning grandparents June 1st, 1971. (65a-67a)

Yet, just a week before the children were required to return to Georgia – immediately upon respondent Susan Durham Spence filing her new custody action; which contained no allegation or suggestion that the children's health or welfare had been adversely affected by being with their grandparents – and without any semblance of evidence, hearing or judicial action, as that term is rightly understood – the terms of the Georgia judgment were summarily set at naught by the Forsyth County District Court ordering that the children not return to Georgia as scheduled. (1a, 2a)

And a few weeks later, under the guise of granting petitioner Ronald Kenneth Spence's request to continue the trial – (summarily scheduled by the court for July 20, notwithstanding that a five months' discovery and preparation period is established by court rule in North Carolina, nothwithstanding that the petitioning grandparents had not even been served with process, and didn't file pleadings until four months later, and notwithstanding that the case could not possibly be fairly tried at that time, there being numerous depositions to

take in California and elsewhere) – the court made the ultimate "modification" of the judgment, by ordering that the children be taken from their North Carolina grandparents, and placed in the sole custody of their mother, Susan Durham Spence, pending the trial – again, without either hearing or evidence. And the children remained in her custody until the case was tried several months later. (3a, 4a)

To say that these were pendente lite orders and within the court's "discretion" does not mask their arbitrary, unjudicial character. What change had occurred requiring the court to then render the Georgia judgment completely inoperative? Nothing materially affecting the children's welfare, certainly, it being found by the same court later that both sets of grandparents were fit and proper persons to have custody of the children, and that the children had been well provided for by all the grandparents. And the record shows that two years had gone by without respondent or anyone else even suggesting that the judgment terms were in any way unfair or detrimental to anybody. By what casuistry can it be said that the pendente lite action of the Forsyth County District Court gave any iota of credit to the Georgia judgment – not one provision of which was left in force before the "trial"? Certainly the judgment was not "given the same effect it had in the courts of the State where it was rendered." *Ford v. Ford, supra.*

C. Full Faith and Credit Denied at Trial

Having already deprived the judgment of all credit and effect during the six months before the issue was even heard, it was not surprising that when the case was tried,

the judge concluded that the judgment had been invalid all along, and in all events should be "modified" because of changing circumstances. (9a, 10a)

In according any credit at all to the judicial proceedings of other states, it is inherent that "changes" which warrant the custody judgment of one state being revamped and revised by another are only those "real and substantial" changes that materially affect the welfare of the children involved – and that what is substantial and what is inconsequential depends upon the circumstances of the particular case, including the condition that existed theretofore and the nature and extent of the changes in it. *Kovacs v. Brewer, supra; Rothman v. Rothman,* 6 N.C. App. 401, 170 S.E 2d 140 (1969); Lee, North Carolina Family Law, Section 226. And by that standard, or indeed any other, when the "condition" that was the basis for the Georgia judgment is taken into proper account the "changes" found by the North Carolina Court were insubstantial and superficial.

The "condition" that prompted the Georgia court to forbid custody to the respondent mother and to forbid her from being with the children except in the grandparent's home had nothing to do with her address, employment or income – all mentioned by the trial judge – because she lived in a good neighborhood in Georgia, was employed there, and had a good income there. Nor was it a mere matter of temporary "emotional instability," as a majority of the North Carolina Supreme Court concluded. As the dissenting opinion makes plain

> the order was entered "because she was deemed MORALLY UNFIT to be entrusted with the custody of two little girls." (53a)

> "The record before us does not leave in doubt the Georgia Court's reason for taking the children from the custody of their mother. In a subsequent order, entered August 23, 1971, the same Georgia court said: 'The prior misconduct and unfitness of Susan Spence to have unsupervised visitation of the children was the impelling reason for the court's approval of the parties' agreement, without which such approval would not have been entered. It was restrictive and intended by the court to be restrictive so as to PREVENT THE MOTHER FROM INSTILLING TENDENCIES TOWARD SEXUAL ABERRATIONS.' " (45a)

That this was the "condition" and none other cannot be doubted. Not only did the Georgia trial judge expressly so declare, but the Georgia Supreme Court and the North Carolina Court of Appeals unanimously so held.

But, instead of determining, or even considering, whether that condition had changed, the trial judge retired the entire case and improperly found that the condition had never existed.

> "The plaintiff's evidence shows no change in the condition on which the Georgia court properly rested its judgment. Her testimony in this action is not that she no longer has homosexual tendencies. Her testimony is that she never had them. This is not evidence of a change in condition." (Justice Lake, 55a)

And that the respondent Susan Durham Spence's moral attitude had in fact undergone no change was shown by her own testimony, as analyzed in the dissenting opinion

> "An especially pertinent revealing statement by the plaintiff mother in her testimony before the District Court, and therefore bearing upon her present ideals and principles, was that she could not throw her husband's mistress out of the house because she tried to treat the mistress 'AS A DAUGHTER,' and so the situation, in her mind, was 'the same as if he had an affair with Dianne [one of the little girls],' in which case she 'wouldn't want to throw anybody out.' " (54a)

CONCLUSION

This case, as Mister Justice Black said about *Kovacs v. Brewer, supra,* "obviously raises difficult and important questions of constitutional law." And, as stated by Justice Lake, in his dissenting opinion herein, "we are dealing in this case with a subject matter unsurpassed by that of any litigation coming before this court." (53a) Unless these important questions are resolved by this court in accord with the Constitution and the rule of law, they will continue to be resolved by the fiat of the several states – with parties in child custody cases being encouraged and permitted to shop for forums advantageous to them, thereby causing chaos and a multiplicity of litigation in this all important field; with the judgments of one state being rendered nugatory by the courts of

another, without hearing and without evidence, contrary to good order and sound judicial concepts. Certiorari should be granted herein to the end that the decision of the North Carolina Supreme Court denying full faith and credit to the Georgia judgment can be set aside, and so that the provisions of the Georgia judgment may be duly enforced, as by law provided.

Respectfully submitted,

EUGENE H. PHILLIPS
2219 Wachovia Building
Winston-Salem, N.C. 27101
Counsel for Petitioners

APPENDIX

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
71 CVD 2541

NORTH CAROLINA)
)
FORSYTHE COUNTY)
)
SUSAN DURHAM SPENCE,)
Plaintiff)
vs.) **ORDER**
)
JAMES ROBERT DURHAM and)
wife, FAYE MUNDY DURHAM,)
RONALD KENNETH SPENCE,)
RICHARD T. SPENCE and wife,)
FRANCES HAWKINS SPENCE,)
Defendants

THIS MATTER coming on to be heard and being heard before the Honorable John C. Clifford, Judge of the General Court of Justice, District Court Division, Forsyth County, North Carolina, upon application of the plaintiff, Susan Durham Spence, and it being made to appear to the court that Fay Frances Spence and Dianna Jeannene Spence are minor children now in the custody of their maternal grandparents in Winston-Salem, Forsyth County, North Carolina, under and pursuant to an order of the Superior Court for the County of Cobb, State of Georgia, dated June 2, 1969; that the plaintiff Susan Durham Spence has filed a complaint in this action alleging facts sufficient to vest jurisdiction of the custody of the two minor children in this court and further alleging facts sufficient to entitle her to the exclusive custody of the said minor children;

ORDER PENDENTE LITE,
FORSYTH COUNTY DISTRICT COURT

NOW THEREFORE, this court is of the opinion that this matter should be set down for hearing to determine what, if any, modification should be made in the June 2, 1969, order of the Superior Court of Cobb County, Georgia, and it is ORDERED, ADJUDGED and DECREED:

1. A custody hearing will be conducted in this action at 2:00 p.m. on June 3, 1971, in chambers before the undersigned Judge of the General Court of Justice, District Court Division, Forsyth County, North Carolina, at which time any and all parties will be heard on any matters affecting the interests of the two minor children who are the subject of this controversy.

2. The two minor children, Fay Frances Spence and Dianna Jeannene Spence shall not be removed by any person from Forsyth County, North Carolina, until this matter may be heard and determinations made regarding the best interests of the children.

3. All pleadings filed in this action shall be impounded by the clerk and revealed to no one except the parties pending further orders of this court.

4. Copies of the complaint and this order shall be served upon the defendants by personal service or by registered mail.

This the 24th day of May, 1971.

J. A. CLIFFORD
Judge Presiding

* * *

ORDER

THIS CAUSE coming on to be heard and being heard before the Honorable John C. Clifford, Judge of the General Court of Justice, District Court Division of Forsyth County, North Carolina, at 2:00 p.m. on Monday, July 19, 1971, upon motion of the defendant, Ronald Kenneth Spence, for continuance of the trial of this matter calendared for Tuesday, July 20, 1971; and

It appearing to the court that the above entitled action was instituted on or about the 24th day of May, 1971, by the plaintiff for the custody of the two minor children born of the marriage of the plaintiff and the defendant, Ronald Kenneth Spence; that a trial in this matter was scheduled before this court upon petition of the plaintiff for the 3rd day of June, 1971; that prior to the 3rd day of June, 1971, the defendant, Ronald Kenneth Spence, petitioned this court for a continuance; that a continuance was granted until the 20th day of July, 1971; that on the 16th day of July, 1971, the defendant Ronald Kenneth Spence, through counsel, mailed notice to counsel for the plaintiff and counsel for the defendants, James Robert Durham and Faye Mundy Durham, of a motion to continue this case until a date after August 6, 1971; that said notice was received by counsel for the plaintiff on July 19, 1971; that the defendant, Ronald Kenneth Spence, through counsel, on July 19, 1971 moved this court for an additional continuance; that present at the hearing was Fred G. Crumpler, Jr., one of the attorneys for the plaintiff, and Weston P. Hatfield and Roy G. Hall, Jr., attorneys for the defendant Ronald K. Spence; that other counsel of record in this case were unable to be present; that counsel for the plaintiff, Susan Durham Spence, again moved the court that custody of the

two minor children, Faye Frances Spence and Dianna Jeannene Spence, be awarded to the plaintiff pending the ultimate trial of the matters at issue; that Ronald Kenneth Spence and Susan Durham Spence, the natural and legal parents of said minor children were both present in court, through counsel, and were heard on all matters before the court; and

The court being of the opinion, after consideration of the pleadings, affidavits previously filed and arguments of counsel, that the motion for continuance should be allowed and that temporary custody of the two minor children should be awarded to the plaintiff, Susan Durham Spence, pending the final hearing and determination of the matters in controversy.

NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED:

1. That temporary custody of Faye Frances Spence and Dianna Jeannene Spence be and the same is hereby awarded to the plaintiff, Susan Durham Spence, under the supervision of the defendants, James Robert Durham and Faye Mundy Durham;

2. That this case shall be continued to a date subsequently to be set by this court upon motion of any party to this action; and

3. No person shall remove or attempt to remove Faye Frances Spence and/or Dianna Jeannene Spence from the State of North Carolina pending further orders of this court.

This the 20th day of July, 1971.

/s/ JOHN C. CLIFFORD
Judge, General Court
of Justice

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
71 CVD 2541

NORTH CAROLINA	)	
	)	
FORSYTH COUNTY	)	
SUSAN DURHAM SPENCE,	)	
Plaintiff	)	
vs.	)	**JUDGMENT**
	)	
JAMES ROBERT DURHAM and	)	
wife, FAYE MUNDY DURHAM,	)	
RONALD KENNETH SPENCE,	)	
RICHARD T. SPENCE and wife,	)	
FRANCES HAWKINS SPENCE,	)	
Defendants	)	

This matter came on to be heard and was heard by the Honorable John C. Clifford, Judge of the General Court of Justice, District Court Division, Forsyth County, North Carolina, on Monday December 20, 1971 and the court having considered the Pleadings, the oral and written evidence and the arguments of counsel makes the following findings of fact and conclusions of law:

FINDING OF FACT

1. All persons named in the title of this action are parties to this action, have filed pleadings herein, are subject to the jurisdiction of this court, are and have been duly and properly represented by legal counsel throughout the trial and hearing of this action, and, were present in Court, during the trial, with the exception of J. R. Durham who was absent due to illness.

2. The plaintiff, Susan Durham Spence, is a citizen and resident of Forsyth County, North Carolina; James Robert Durham and wife, Faye Mundy Durham, are citizens and residents of Forsyth County, North Carolina; Ronald Kenneth Spence is a citizen and resident of the State of Kansas, and, Richard T. Spence and wife, Frances Hawkins Spence, are citizens and residents of the State of Georgia.

3. Susan Durham Spence and Ronald Kenneth Spence were married on the 9th day of September, 1960 in Winston-Salem, North Carolina. Two children, who are the subject of this controversy, were born of this marriage, Fay Frances Spence on the 15th day of June, 1962 and Dianne Jeannene Spence on the 5th day of June, 1964. Susan Durham Spence and Ronald Kenneth Spence were divorced in Cobb County, Georgia on the 2nd day of June, 1969.

4. At the time of the institution of this action in Forsyth County by Susan Durham Spence, the two children, Fay and Dianne, were residing with their maternal grandparents, James Robert Durham and Faye Mundy Durham, in Winston-Salem, North Carolina and this court had jurisdiction then and has jurisdiction now to hear and determine any and all matters in controversy regarding their custody, welfare and support. Except for summer vacations and holidays, Fay and Dianne have resided with the maternal grandparents since June 2, 1969, in Forsyth County, North Carolina, until July 20, 1971 when temporary custody was awarded Susan Durham Spence by this court. The children have been with their mother in Winston-Salem since July 20, 1971.

5. The two children, Fay and Dianne, while in the custody of their mother, Mrs. Susan Durham Spence, have at all times been well, fully and adequately cared for.

6. The plaintiff, Susan Durham Spence, is a well educated and intelligent woman who has, since moving to Winston-Salem in the latter part of 1969, established a successful and growing speech therapy clinic for children and adults. She has rented and furnished a two bedroom apartment in one of the better sections of Winston-Salem which is adequate in all respects for a home for herself and Fay and Dianne. Susan Durham Spence is respected in this community by professional people with whom she deals and is a person of high character and reputation. She is an active member of Trinity Methodist Church where she participates in religious training for children and sings in the choir.

7. Fay and Dianne Spence have for more than two years resided in the City of Winston-Salem except for holidays and summer vacations. All of their schooling and maintenance and upkeep while in Winston-Salem have been paid for by their mother and maternal grandparents and their father has contributed nothing to their maintenance or schooling or upkeep since June of 1969. The two children have established excellent associations and records in school since they moved here in 1969 and their best interests will be served by their continuing to live and being schooled in this city. It is against the best interest of the children to be moved for extended periods of time and on their holidays from their primary environment. The best interest of these two minor children shall be served by their custody being awarded to their mother, Susan Durham Spence.

8. The maternal grandparents Durham and the paternal grandparents Spence are all fit persons to have the custody of Fay and Dianne. All four grandparents, however, are of such age that the best interest of the two children will be served by awarding primary custody to their mother.

9. On or about January 9, 1969, Ronald Kenneth Spence, instituted an action against Susan Durham Spence in Cobb County, Georgia asking for a divorce from Susan Durham Spence and for custody of Fay and Dianne. He came to the office of Susan Durham Spence and took Fay and Dianne without telling their mother that he was taking the children and where he was taking them. He subsequently took the two children to the house of his mother and father, Mr. and Mrs. Spence, some sixty (60) miles away. In February, 1969, without hearing, the court in Cobb County, Georgia entered a temporary order awarding custody of the two children to the paternal grandparents Spence and depriving the plaintiff of the right of seeing her children except for two hours each week in the presence of the Spences. This condition continued until May, 1969, when the case was calendared for trial in Cobb County, Georgia. On June 2, 1969 a written document was signed in Cobb County, Georgia by the attorneys representing the parties and the Presiding Judge without any evidence being offered or considered by the court at any time on the issue of custody and without written approval of any parties. On the date that the order was finally drawn up and signed by the attorneys and the judge, June 2, 1969, none of the parties to the action was present in court. The subject document filed in the Cobb County action makes no findings of fact from which this court can ascertain what if any findings were made by the court to justify or support the determination of custody and the other matters there apparently resolved. The document entered on June 2, 1969 in Cobb County, Georgia does not constitute a judgment entitled to full faith and credit; does not prevent this Court from hearing this case; nor, does it estop the plaintiff from bringing and proceeding with this action.

10. Even if the document entered by the Cobb County, Georgia court on June 2, 1969 is valid and enforceable judgment and entitled to full faith and credit by the courts of this State, where jurisdiction of the minor children now rests, there have been substantial changes in the conditions since June 2, 1969 which dictate that the said order be altered or amended in the same manner that it could be altered and amended by the courts of the State of Georgia, including but not necessarily limited to the following:

a. The defendants Spence stated in open court that it is their contention that at the time of the entry of the document in Cobb County on June 2, 1969 that Susan Durham Spence was not a fit and proper person to have custody of Fay and Dianne. If that be the case and the justification for the entry of the June 2, 1969 instrument, then that condition has substantially changed in that Susan Durham Spence is now a fit and proper person to have the custody of her children.

b. At the time of the entry of the June 2, 1969 document, Susan Durham Spence was highly emotional as well she should have been since her children were taken from her without her knowledge or consent on January 9, 1969 and since that date she had never been allowed to have her children in her care and custody alone. Today Susan Durham Spence is a well adjusted emotionally stable individual fully capable of caring for and rearing Fay and Dianne.

c. Fay and Dianne are now older and at an age, when they need the care, love and attention of their mother. On June 2, 1969 this was not as crucial to their well-being as it is today.

d. The grandparents Spence and Durham are not as able to respond to the daily needs of these two small girls as they were on June 2, 1969; J. R. Durham is in ill health at the present time; and, the burden of the financial support and care and custody of Fay and Dianne should not now be imposed on the grandparents.

e. Ronald Kenneth Spence, has, since the entry of the June 2, 1969 document, become the father of an illegitimate child, remarried, became the father of a legitimate child and moved to the State of Kansas where he is unemployed, has no income from any source, and is living off the accounts receivable of his present wife who is also unemployed.

f. Fay and Dianne have been in the sole and exclusive custody of their mother since July of 1971, a period of five (5) months.

g. Susan Durham Spence now has an established profession and home in this community where she is more than able to adequately care for the needs of the two children. Her routine and schedule of work here is such that she can be with the children almost all times when they are not actually in school.

11. Ronald Kenneth Spence is a highly educated and intelligent person who is fully capable of earning a living and supporting his children and should be required to contribute to the support, maintenance and education of Fay and Dianne. At the present time Ronald Kenneth Spence is, by choice, unemployed. This court has insufficient evidence before it to determine at this time the proper amount that Ronald Kenneth Spence should be required to contribute to the support of Fay and Dianne.

The present wife of Ronald Kenneth Spence made no appearance in this action. This Court makes no findings regarding the fitness of Ronald Kenneth Spence to have custody of the children on a temporary basis from time to time in his home due to insufficient evidence on the point being presented, but the Court will reconsider the matter upon motion.

12. The father, the paternal grandparents and the maternal grandparents should be allowed reasonable visitation rights in North Carolina. The best interest of Fay and Dianne dictate that they not be taken from the State of North Carolina and the care of their mother, except for limited periods of time and only after there has been full assurance that the children will be returned to their mother at the end of any permitted periods of visitation outside this state. This court should retain this matter for consideration of requests of the father and paternal grandparents, if there be any, for the right to take the children from this state for limited visitation.

CONCLUSIONS OF LAW

1. All parties in interest in this matter are properly before this court and this court has jurisdiction to hear the matters in controversy.

2. This court is not bound by the document entered in Cobb County, Georgia on June 2, 1969 and if it is, there have been sufficient substantial changes in the circumstances surrounding the parties and particularly these children that this court should, for the best interest of the children, alter or amend the said document.

3. Susan Durham Spence is a fit and proper person to have the exclusive custody of her two minor children. Fay and Dianne.

4. The best interest of Fay and Dianne dictate that their custody be awarded to their mother, Susan Durham Spence.

5. Ronald Kenneth Spence is fully capable of earning sufficient money to adequately support his present family and contribute to the support of Fay and Dianne. This court shall retain this matter for further hearing regarding the cost of maintenance, support and education of Fay and Dianne and the portion thereof that should be contributed by the father, Ronald Kenneth Spence.

6. By consent of the parties evidenced in open court, this court shall retain this matter for further rulings as to visitation rights of the paternal grandparents Spence and the father, Ronald Kenneth Spence, outside the State of North Carolina.

7. Fay and Dianne should have reasonable visitation with their maternal grandparents Durham at times convenient to the Durhams and Susan Durham Spence.

NOW, THEREFORE, IT IS ORDERED ADJUDGED AND DECREED:

1. The exclusive care, custody and control of Fay Frances Spence and Dianne Jeannene Spence are awarded to their mother, Susan Durham Spence;

2. This court shall reopen this matter for hearing upon ten (10) days notice after request of any party as to the amount of money that Ronald Kenneth Spence should contribute to the support, maintenance and education of Fay Frances Spence and Dianne Jeannene Spence;

3. The father, paternal grandparents and maternal grandparents shall have reasonable visitation rights with Fay and

Dianne in North Carolina at such times as shall not interfere with their schooling and daily routine. No person shall take or remove Fay and Dianne from the State of North Carolina, except their mother. This court shall consider granting reasonable visitation rights outside the State of North Carolina to the paternal grandparents and the father, Ronald Kenneth Spence, at any time upon request of either of said parties; and

4. The costs of this action are taxed against the defendant, Ronald Kenneth Spence. Such costs shall include attorneys' fees of *$zero* to be paid to the attorneys for Susan Durham Spence.

This the 11th day of January, 1972.

/s/ John C. Clifford
Judge Presiding

COURT OF APPEALS OF NORTH CAROLINA
FALL TERM, 1972

No. 7221DC564

SUSAN DURHAM SPENCE

v.

JAMES ROBERT DURHAM *et al.*

October 25, 1972

Plaintiff instituted this action on 25 May 1971 seeking custody of two children born of her marraige to defendant, Ronald Spence.

In January of 1969, Ronald Spence instituted an action in the Superior Court of Cobb County, Georgia, seeking a divorce from plaintiff and custody of the children. In February 1969, a temporary order was entered in that court placing the children in the custody of their paternal grandparents, defendants Richard Spence and Frances Spence. The maternal grandparents, James Robert Durham and Faye Mundy Durham, were allowed to intervene in the Georgia action insofar as it related to custody of the children. On 2 June 1969, judgment was entered in the Superior Court of Cobb County, Georgia. The divorce was granted. The court ordered that the custody of the children be taken from both parents and placed in the custody of their maternal and paternal grandparents. All the parties were represented by counsel and the judgment was

signed as approved and consented to by attorneys for each of the parties. All of the parties except the Durhams were residents of Cobb County, Georgia. The Durhams reside in Winston-Salem, North Carolina. The Georgia judgment generally placed custody of the children in the paternal grandparents (Spences) during vacation periods and gave the Durhams custody during the school months, with provisions for interim visitation.

Plaintiff continued to reside in Georgia until the Fall of 1970. She consulted attorneys about a suit in the Georgia court to regain custody of the children. Plaintiff testified that she was advised by counsel to move elsewhere and that she did, in the Fall of 1970, move to Winston-Salem for the purpose of obtaining custody of the children.

The complaint in the present action was filed on 25 May 1971, just a few days before the children were due, under the terms of the Georgia judgment, to return to the home of their paternal grandparents in Georgia. Judge Clifford, without notice to defendants, apparently heard plaintiff or her attorneys *ex parte* and on 24 May 1971, signed an order which, among other things, in effect forbade compliance with the order of the Georgia court in that it specifically prohibited the removal of the children from Forsyth County. The order also ordered that all pleadings be impounded and revealed to no one except parties to the action. The complaint and order were filed the following day. On 20 July 1971, Judge Clifford signed an order placing the children in the custody of the plaintiff pending trial and final disposition of the controversy.

The case came on for hearing before Judge Clifford on 13 December 1971. Judgment was entered on 31 January 1972, awarding exclusive custody of the children to

plaintiff and forbidding the removal of the children from the State of North Carolina by any person other than the plaintiff. Defendants, James Robert Durham and Faye Mundy Durham, did not appeal, having previously filed answer in which they expressed their willingness to comply with the order of the Georgia court or such changes in that order as the District Court of Forsyth County might deem to be in the best interest of the children.

Defendants, Ronald Kenneth Spence, Richard T. Spence and Frances Hawkins Spence, appealed.

Hudson, Petree, Stockton, Stockton & Robinson by Norwood Robinson, and White & Crumpler by Fred G. Crumpler, Jr., Winston-Salem, for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Jr., Winston-Salem, for Mr. and Mrs. James Robert Durham, plaintiffs appellees.

Hatfield, Allman & Hall, by Roy G. Hall, Jr., Winston-Salem, for defendants appellants.

VAUGHN, Judge.

[1, 2] Among other things, the trial judge held "that the document entered on June 2, 1969 in Cobb County, Georgia does not constitute a judgment entitled to full faith in credit. . . ." To so hold constituted patent error. However, the judge did correctly conclude that, even if the judgment was entitled to full faith and credit, the courts of this State have jurisdiction to enter orders providing for the custody of minor children when they are phsyically present in this State. G.S. §50-13.5(c)(2)a and G.S. §50-13.7.

[3, 4] It is well settled that upon appropriate findings of fact showing changed circumstances substantially affecting the welfare of the children, the court may modify a prior order awarding custody. The burden is upon the party seeking modification of the order to show the changed circumstances which substantially affect the welfare of the children.

[5] The record on appeal in this proceeding consists of 403 pages. It is neither necessary nor desirable to review the evidence set out in this record and, because of its nature, we have elected not to do so. It suffices to say that the evidence does not support the findings of fact and that the findings of fact do not support the judgment. The judgment of the Superior Court of Cobb County, Georgia remains in full force and effect. The judgment and orders of the District Court of Forsyth County purporting to modify the same are reversed.

Reversed.

PARKER and GRAHAM, JJ., concur.

IN THE
SUPREME COURT OF NORTH CAROLINA
SPRING TERM 1973

SUSAN DURHAM SPENCE

v.

JAMES ROBERT DURHAM and
wife, FAYE MUNDY DURHAM,
RONALD KENNETH SPENCE,
RICHARD T. SPENCE and wife,
FRANCES HAWKINGS SPENCE

No. 18 – Forsyth

August 31, 1973.

SHARP, Justice:

Plaintiff, Susan Durham Spence, born 11 June 1935, instituted this action on 24 May 1971 to obtain the custody of her two minor daughters, Fay Frances Spence, born 15 June 1962, and Dianna Jeannene Spence, born 5 June 1964. The defendants are Ronald Kenneth Spence, the children's father (Spence); James Robert Durham and wife, Faye M. Durham, the parents of plaintiff (maternal grandparents or Durhams); and Richard T. Spence and wife, Frances H. Spence, the parents of Ronald K. Spence (paternal grandparents). All parties are properly before the court and participated in the proceeding in which the judgment *sub judice* was rendered.

Plaintiff and her parents are residents of Winston-Salem, Forsyth County, North Carolina. Spence is a resident of the State of Kansas; the paternal grandparents reside in the State of Georgia. The children have been physically present in this State since September 1970.

The following events, stated chronologically insofar as possible, disclose a portion of the background of this controversy:

Plaintiff and Spence met in 1959 at the University of Georgia, from which each obtained a bachelor's degree. Thereafter, on 9 September 1960, they were married in Winston-Salem, North Carolina. In 1961 both enrolled as graduate students at the University of Virginia. There Spence pursued courses in advanced chemistry, and plaintiff studied speech pathology. Spence, who became "disinterested in chemistry," dropped out of school in late 1961 and obtained employment with the Sperry Piedmont Company as an engineering analyst. Plaintiff continued her studies under a scholarship. She obtained the degree of Master of Education in Speech Pathology and Audiology shortly before the birth of her first child, Fay.

In April 1963, after Spence had worked for eighteen months with the Sperry Company, he and plaintiff moved to California. There, for about two years, he was employed by "Lockheed Missiles and Space Company in the field of computers" at Sunnydale. During this period plaintiff's second child was born, and she worked part of the time in a hospital at Mountain View, where the family lived. In May 1965 Spence left Lockheed to work for Univac, a division of Sperry Rand Corporation, in San Diego. In the fall of 1966, with the idea that they might work together, both plaintiff and Spence enrolled in the

University of California at San Diego for studies in linguistics. To further his studies Spence gave up his job with Univac in December 1966 and obtained employment at the University of California. Plaintiff worked at the speech and hearing center there from August 1965 until late August 1967, when she left California to teach at the University of Richmond in Virginia

Plaintiff's move to Richmond was for professional and financial reasons. Her sojourn there was not intended as a separation from Spence, who visited her a number of times in Richmond. At different times between August and December, Spence and the respective grandparents cared for the children. In early December, Spence withdrew from the University of California and went to the home of his parents in Georgia. At that time he delivered the children to plaintiff in Richmond, and they remained with her there until the completion of her contract in June 1968.

From 15 January 1968 until March 1970, when he was "laid off in a mass reduction in force," Spence worked for Lockheed at Smyrna, Georgia. In June 1968 plaintiff and the two children joined Spence in Smyrna, where they shared his one-bedroom "bachelor's apartment," and plaintiff started a private practice in speech therapy. In July 1968 an 18-year-old girl, Linda Preyer, who had kept house for them in San Diego, came to live with plaintiff and Spence in the bacehlor's apartment. In the fall plaintiff and the children moved into an adjoining apartment.

On 9 January 1969 Spence brought an action for divorce against plaintiff in the Superior Court of Cobb County, Georgia. On that morning he informed plaintiff that he would vacate his apartment during the day. Plaintiff took the children to school as usual and, at 3:30 p.m.,

she went for them. She left them in the playroom of her speech and language school, where they were to remain while she saw her last pupil of the day. That task completed she returned to the playroom to find the children gone. It was "days later" before she learned that Spence had taken the children to the home of their paternal grandparents about sixty miles away. Upon inquiry the paternal grandmother had denied that the children were there and that she had any knowledge of their whereabouts.

Plaintiff was not permitted to see the children until after 3 February 1969, when the Georgia court issued a temporary order giving Spence's parents custody of the children *pendente lite*. That order denied both Spence and plaintiff any access whatever to the children except that each was allowed one two-hour visitation each week in the home of the paternal grandparents.

On 6 February 1969 the maternal grandparents petitioned the court to allow them to intervene in the pending divorce action and were allowed to do so. They prayed that, if the court should conclude neither plaintiff nor Spence was a suitable custodian the custody of the two children be awarded to them. The paternal grandparents were also permitted to intervene. Thus, the parties to the Georgia proceeding and to this one are the same.

On 2 June 1969, the day the case was scheduled for trial, all parties were present in court and represented by counsel. Plaintiff did not contest Spence's action for divorce, and he obtained an absolute divorce on the grounds of mental cruelty.

On the issue of custody the court heard no evidence. That controvery was determined by a consent judgment, which was signed by the judge and by counsel for all parties. In pertinent part this judgment is summarized below:

1. The court awarded custody of the two children to the paternal grandparents during the months of June, July, and August of each year and to the maternal grandparents during the months of September through May. Plaintiff and Spence were given the right to visit the children in the home of their respective parents without restriction. Each was, however, enjoined from removing the children from the grandparents' homes, and the grandparents were under positive orders to prevent the children's removal. During the school months, when the Durhams had custody, the paternal grandparents had the right to have the children visit in their home during all school holidays. The judgment provided for alternative divisions of custody between the grandparents in the event of the death of one or more grandparents, the final award being to the last surviving grandparent.

2. Both Spence and plaintiff were relieved of all obligations to support their children. Neither maternal nor paternal grandparents were to look to either of them for reimbursement of any sums expended for the maintenance and education of the children. The grandparents having custody were to pay the children's expenses during the time they had them. The Durhams were to send the children to private schools in Winston-Salem, and the grandparents receiving the children at the end of each custody period were to pay the cost of transporting them to their home.

3. Both maternal and paternal grandparents canceled all debts which either plaintiff or Spence owed them.

4. The maternal grandparents were required to give a bond in the sum of $10,000.00 conditioned upon their compliance with the consent judgment and any future orders of the court. The clerk of the Superior Court of Cobb County was appointed process agent for the Durhams in any proceedings regarding the custody of the children and any breach of the terms of the bond.

As directed by the judgment, on 20 June 1969, the Durhams executed and delivered to the Sheriff of Cobb County a compliance bond in the sum of $10,000.00.

Spence testified that within two weeks after he instituted divorce proceedings against plaintiff, on 20 January 1969, he was in touch with Dr. Arlene Gregory, whom he had met in 1955 when she was a pre-medical student. He had courted her unsuccessfully just before he married plaintiff, "perhaps on the rebound." In July 1969 Spence and Dr. Gregory were married. At that time she had just finished her graduate residency in anesthesiology.

In late August 1969 the Spence children went to the home of the Durhams in Winston-Salem. Except for school holidays, which they spent with the paternal grandparents, the children remained with the Durhams until June 1970 when they returned to Georgia as required by the consent judgment.

In the summer of 1969 plaintiff left Smyrna and went to Rome, Georgia to become the director of the Northwest Georgia Speech and Hearing Center, a fourteen-county governmental speech pathology and hearing clinic for children and adults. In September 1970 she moved to Winston-Salem to become head of the department of speech pathology at the Medicenter of America's facility there.

In September 1970 the Spence children returned to the home of the Durhams in Winston-Salem for the school year 1970-71.

On 24 May 1971, without the knowledge of her parents, plaintiff brought this action to obtain the custody of her children. On 25 May 1971 she secured from the District Court of Forsyth County an order restraining the removal of the children from Forsyth County pending that court's determination of their custody. In that order the hearing on this question was set for 3 June 1971. Mrs. Durham testified that but for the injunction prohibiting her from doing so she would have returned the children to Georgia as she had previously done. Upon receiving the court's order she immediately informed the paternal grandparents of it and returned the travel tickets they had sent the children.

On 3 June 1971 the paternal grandparents and Spence petitioned the Cobb Superior Court to attach the maternal grandparents for contempt and to forfeit their $10,000.00 bond. In that proceeding the Durhams pled, *inter alia,* the order of the North Carolina court restraining the removal of the children from the State. On 23 August 1971 the Cobb Superior Court held Mr. and Mrs. Durham in contempt, fined them $200.00 each, and forfeited their bond. These orders were affirmed by the Supreme Court of Georgia. *See Durham v. Spence,* 228 Ga. 525, 186 S.E. 2d 723 (1972). Thereafter, on 30 March 1972 the Superior Court of Cobb County ordered the proceeds of the bond paid to the paternal grandparents.

The hearing of the controversy, *sub judice,* originally set for 3 June 1971, was continued at Spence's request and rescheduled for July 20th. On that day Spence again requested a continuance, and the cause was continued indefinitely to a date to be set by the court upon motion

of any party to the action. At the same time, however, the court signed an order giving plaintiff temporary custody of the children, and the Durhams surrendered the children to her on 20 July 1971. Since that date they have resided with plaintiff.

At the hearing, which was begun on 29 September 1971, all parties offered evidence with reference to the circumstances and conditions which preceded the separation between plaintiff and Spence. This evidence fully explained the consent judgment of 2 June 1969, which divested both plaintiff and Spence of the custody of their children.

Plaintiff and Spence, neither of whom had testified in the Georgia proceeding, both testified at the hearing before Judge Clifford, and both were extensively cross-examined. The testimony of each, with reference to the conduct of the other, and their admissions with reference to their own conduct, disclosed improper behavior on the part of both so extraordinary as to seem incredible. Plaintiff and Spence each denied portions of the other's testimony. However, the admissions of each together with the corroborative evidence of other witnesses, suffice to establish the existence of a situation in their home *in Smyrna during the five months from August through December 1968*, which was beyond the pale of the most permissive society. To perpetuate this evidence in our reports would not only be a disservice to "two little girls [who] are very exceptional children," but would perhaps put a stumbling block in the way of their mother's continued restoration. For this reason we omit any discussion of it.

It may be that a conceivable explanation of the conduct of the plaintiff and Spence is to be found in the fact that in January 1969 both were in such a state they were

consulting psychiatrists. Spence testified that at the time the consent judgment was entered he was unable to care for his children "in terms of residence" and that "the emotional and psychological turmoil during the previous year" had left him "equally unqualified." At the "strong instance" of his father he was seeing a psychiatrist. Plaintiff testified that, at the same time, she too was consulting a psychiatrist.

Spence's explanation for his behavior was that he "was very much subordinated by Susan's personality"; that she had "a much stronger personality than his in terms of will and ability to persuade." He told the court that he "was acting in response to being dominated by [his] wife," who "was controlling [his] actions to a certain extent," and that "many actions were fully dominated by her." Spence also testified that during the periods in which plaintiff "was not emotionally distressed she was a good mother . . . very concerned for her children's welfare." In his opinion she was disqualified as a custodian only because she was not sufficiently stable over a sufficiently long period of time to gurantee the children "a consistent environment."

Spence's father testified that, in his opinion, in January 1969 neither his son nor plaintiff was a fit person to have control of the children and, for that reason, he had intervened in the custody proceeding; that he thought his son was "showing tremendous improvement" in December 1971, but he still believed himself to be a better custodian than Spence. However, when pressed on cross-examination, he said "Actually there are no defects in Ronnie now"; he is "now a fit and proper person to have custody of the two daughters." Implicit in the testimony of Mr. Spence was the opinion that plaintiff remained unfit to have the children's custody. Plaintiff's mother

testified that, in her opinion, plaintiff was the fit and proper person to have the custody and Spence was not; that she had never believed the charges Spence made against her daughter.

In April 1971 Spence went to work as supervisor of programming in the data processing department of the Retail Credit Company in Atlanta, Georgia. He resigned this position in November 1971 to move with his wife to Parsons, Kansas. He testified that she felt she should go to Parsons to care for her invalid twin sister. At accessible schools in Kansas, Spence said he hoped to continue his education and to obtain a PhD degree in the field of linguistics. At the time of the hearing in Forsyth County both he and his wife were unemployed and living off the accounts receivable from her former practice. These, Spence thought, would be sufficient to support him, his wife, their 18-months-old baby, and his two daughters (should he be awarded their custody) until his wife could re-establish a practice and until he could get a PhD and secure a teaching position. In the meantime Spence had no income from any source whatever. However, unless he gets custody himself he does not "want to pay one penny of support for the girls."

Plaintiff testified that she is now a clinical speech pathologist, certifed by the American Speech and Hearing Association; that she continues as head of the speech pathology department at the Medicenter's Winston-Salem facility, where she gives therapy to all types of in-patients with speech afflictions; that she also conducts an out-patient clinic in which she gives speech therapy to both children and adults in the entire Forsyth County area and sees patients from Greensboro, Salisbury, High Point, Statesville, and Lexington; that forty-five percent of the patients are children. Spence testified that plaintiff "was

a very talented teacher." She has had dramatic successes with many children.

At the time of the hearing plaintiff was residing with the two children "in a very nice two-bedroom, pool-side apartment" on Country Club Road directly across the street from the children's school and the Trinity Methodist Church of which she is an active member. She sings in the choir and participates in all church functions. The children regularly attend Sunday School, sing in the children's choir, and take part in all the youth activities. They are Girl Scouts and do superior work in school. Each morning plaintiff "walks them across the street to school" before she goes to work and returns to pick them up at 3:00 p.m.

In July 1971 plaintiff consulted Dr. David Allen Hill, a clinical psychologist on the faculty of Wake Forest University. He had not previously known her. She informed him of the accusations which had been made against her and which would be made again with reference to her fitness as a custodian of her children and requested him to test and examine her fully. Dr. Hill testified that he warned her that his tests might reflect unfavorably upon her and she replied that "if the test suggested something wrong with her, she'd rather know it." After administering a series of eight tests, Dr. Hill concluded that plaintiff was, "in the ordinary sense of the word, a normal individual," showing "normal female interests in work and hobby and relating to people," and that she enjoyed working with children. He found no evidence of a personality pattern consistent with sexual deviancy, prolonged promiscuity, or peculiar behavior. In his opinion she was not lying; that she attempted to present herself in "as positive and as honest a light as she could."

Dr. Richard C. Proctor, head of the department of psychiatry at the Bowman-Gray School of Medicine testified that in March 1971 he examined plaintiff and, in his opinion, she would be a competent and capable mother, able to assume the responsibility of rearing her children in a satisfactory manner; that one could have had a disorder in 1968 which was not present in 1971; and that he could find no indication of abnormal tendencies in her.

Plaintiff also offered evidence that her character and reputation in the community were good. The minister of Trinity Church, the Reverend Mr. George Bumgarner, testified that since June 1970 he had known plaintiff and observed her with her children; that they had a happy normal relationship and the children seemed well adjusted.

Spence testified that, "pursuant to this case," during 1971 he had employed and paid detectives to observe plaintiff, find out what her circumstances were, and to discover whether she was engaged in any abnormal conduct. These detectives were not tendered as witnesses and did not testify.

The hearing before Judge Clifford lasted four days. At its conclusion he found facts, the pertinent portions of which, except when quoted, are summarized below:

1. Since 20 July 1971, when plaintiff was awarded temporary custody of the two children, they "have at all times been well, fully, and adequately cared for."

2. Plaintiff is a well educated and intelligent woman who, since moving to Winston-Salem in 1969, has established a successful and growing speech therapy clinic for children and adults. She has rented and furnished an apartment "in one of the better sections of Winston-Salem which

is adequate in all respects as a home for herself, Fay and Dianne. Susan Durham Spence is respected in this community by professional people with whom she deals and is a person of high character and reputation. She is an active member of Trinity Methodist Church . . . . She is a person exceptionally well qualified by training and experience to rear children and is in all respects a fit and proper person to have the custody of her two minor children who are subject to this action."

3. Since the two children first came to Winston-Salem in 1969 to live with the Durhams during the school months they "have established excellent associations and records in school." Their best interests require that they live continuously in "their primary environment," and that their custody be awarded to their mother, the plaintiff.

4. Both the maternal and paternal grandparents are fit persons to have custody of the children, but all four grandparents "are of such age that the best interest of the two children will be served by awarding primary custody to their mother."

5. The judge of the Superior Court of Cobb County, Georgia, signed the judgment of 2 June 1969 without having heard any evidence, and he made no findings of fact in support of the court's award of custody to the grandparents.

6. The contention of the defendants Spence, stated in open court, is "that at the time of the entry of the Cobb County judgment Susan Durham Spence was not a fit and proper person to have custody of Fay and Dianne."

7. Irrespective of jusitfication for the Cobb County judgment "there have been substantial changes in the conditions

since 2 June 1969 which indicate that the said order be altered." Among these changes are the following.

a. Plaintiff, Susan Durham Spence, is now a fit and proper person to have the custody of her children.

b. On 2 June 1969 plaintiff was highly emotional in consequence of the abduction of her children on 9 January 1969 and deprivation thereafter of the right to see them alone. Today she is "a well-adjusted, emotionally stable individual, fully capable of caring for and rearing Fay and Dianne."

c. The two girls are now older and at an age when they have greater need of a mother's care and attention. The grandparents are not as able to respond to the children's needs as they were in 1969, and the burden and expense of their care and support should no longer be imposed upon them.

d. Spence has become the father of an illegitimate child. He has remarried and fathered a legitimate child, moved with his wife and *their* child to Kansas. He is unemployed and living on the accounts receivable of his present wife, who is also unemployed.

e. Plaintiff has an established profession and home and has made a place for herself in the community where she is able to care for herself and her children adequately. Her routine and schedule is such that she can be with them the greater part of the time they are not in school.

Upon the foregoing findings of fact the court concluded:

(1) The courts of this State are not bound by the Georgia judgment entered in Cobb County on 2 June 1969; and

(2) In the event the Georgia judgment is entitled to full faith and credit, the conditions surrounding the parties have changed so substantially that the best interests of the children require the judgment be altered by awarding their custody to their mother. Whereupon the court awarded the exclusive care, custody, and control of the children to plaintiff, granting Spence and the paternal grandparents the right to visit the children in North Carolina at reasonable intervals.

From this judgment Spence and the paternal grandparents appealed to the Court of Appeals. That court held (1) that Judge Clifford erred in his ruling that the Georgia judgment was not entitled to full faith and credit, but (2) that he had correctly concluded the courts of this State have jurisdiction to enter orders providing for the custody of minor children physically present in this State and, upon a showing of changed conditions, to modify any order for custody made by the court of another state. G.S. § 50-13.5(c)(2)a (1971 Supp.) and G.S. § 50-13.7(b). The Court of Appeals then disposed of the case as follows: "It suffices to say that the evidence does not support the findings of fact and that the findings of fact do not support the judgment. The judgment of the Superior Court of Cobb County, Georgia, remains in full force and effect. The judgment and orders of the District Court of Forsyth County purporting to modify the same are reversed." *See Spence v. Durham,* 16 N.C.App. 372, 191 S.E.2d 908 (1972).

Plaintiff petitioned this Court for certiorari, and we allowed the petition, 282 N.C. 582, 193 S.E.2d 743.

[1] The general rule is that, under the full faith and credit clause of the United States Constitution (art. IV,

§1), a judgment of a court of one state must be given the same effect in any other state which it has by law or usage in the courts of the state where it was rendered. *Ford v. Ford,* 371 U.S. 187, 83 S.Ct. 273, 9 L.Ed.2d 240 (1962); 47 Am.Jur.2d Judgments §§1219, 1226 (1969). "The Supreme Court of the United States, however has not yet declared in positive terms that the provisions of a foreign divorce decree relating to custody are entitled to full faith and credit where the divorce court had jurisdiction in personam of both spouses or of both parties and the child." 24 Am.Jur.2d Divorce and Separation §998, at 1136(1966). *See generally Ford v. Ford, supra; Kovacs b. Brewer,* 356 U.S. 604, 78 S. Ct. 963, 2 L.Ed.2d 1008 (1958); *May v. Anderson,* 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953); *Halvey v. Halvey,* 330 U.S. 610, 57 S.Ct. 903, 91 L.Ed. 1133 (1947).

[2] it is widely held by state courts, however, "that child custody awards by courts of sister states are entitled to full faith and credit." Annot., 35 A.L.R.3d 520, 538 (1971). Our own decisions establish that the courts of this State will accord full faith and credit to the custody decree of a sister state which had jurisdiction of the parties and the cause as long as the circumstances attending its rendition remain unchanged. However, when a child whose custody is in dispute comes into this State our courts have jurisdiction to determine whether or not conditions and circumstances have so changed since the entry of the custody decree that the child's beset interests will be served by a change of custody. G.S. §50-13.5(c)(2)a; G.S. §50-13.7(b). *See In re Marlowe,* 268 N.C. 197, 150 S.E.2d 204 (1966); *In re Craigo,* 266 N.C. 92, 145 S.E.2d 376 (1965); *Celland v. Cleeland,* 249 N.C. 16, 105 S.E.2d 114 (1958); *Richter v. Harmon,* 243 N.C. 373, 90 S.E.2d 744 (1956).

[3] In both Georgia and North Carolina a decree awarding the custody of minor children determines only the *present* rights of the parties under the conditions then existing; it is not permanent in its nature and is subject to judicial alteration or modification upon any change of circumstances substantially affecting the welfare of the children. *Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E.2d 357 (1968); *Wilson v. Wilson,* 269 N.C. 676, 153 S.E.2d 349 (1967); *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871 (1963); *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884 (1949); *Holmes v. Holmes,* 211 Ga. 827, 89 S.E. 2d 194 (1955); *Fortson v. Fortson,* 195 Ga. 750, 25 S.E. 2d 518 (1943). The rule is that the welfare of the child whose custody is in controversy is "the polar star by which the courts must be guided in awarding custody."

[4] The Supreme Court of the United States has specifically held that where the court of one state is empowered to alter its own custody decree upon a showing of a change in circumstances affecting the question, the courts of another state may also modify it upon the same grounds. *Ford v. Ford, supra; Kovacs v. Brewer, supra; Halvey v. Halvey, supra.* Since the Georgia court could alter its decree upon a showing of a change in circumstances adversely affecting the children no question of the right of the Carolina court to do so can arise.

We do not deem it necessary to consider the question (discussed in the briefs) whether a consent judgment fixing custody, rendered by the court of a sister state which failed to conduct adversary proceedings and inquire into the circumstances affecting the child, is entitled to full faith and credit. *See* Annot., 35 A.L.R.2d 520, 560 (1971); 24 Am.Jur.2d Divorce and Separation §819 (1966).

[5, 6] Certainly it is the court's duty to award custody in accordance with the best interests of the child, and no agreement, consent or condition between the parents can interfere with this duty or bind the court. *In Re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962); *Thomas v. Thomas*, 248 N.C. 269, 103 S.E.2d 371 (1958); 3 Strong, N.C. Index 2d, Divorce and Alimony §§ 22, 24 (1967). However, an agreement between the parties with reference to custody which is accepted by the court and incorporated in its decrees, is "none the less a judgment of the court, having the usual attribute[s] of conclusiveness." *Fortson v. Fortson*, 195 Ga. 750, 754; 25 S.E.2d 518, 522 (1943). *See also Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240 (1964).

We do not assume that the Superior Court of Cobb County, Georgia, entered its judgment in this case "casually, pursuant to an agreement of the parties and without a true, judicial consideration of the facts." 24 Am.Jur.2d Divorce and Separation §819 (1966). On the contrary, we assume the judge was apprised of the evidence the parties were prepared to offer and agreed with them that the custody decree which he signed was, at that time, in the best interests of the children and their parents, Since the decree contained no findings of fact – purposely omitted, we are certain – it was necessary for the Forsyth District Court to hear evidence with reference to conditions existing at the time the Georgia decree was entered before it could evaluate the controversy and determine whether changed circumstances justified its modification. 24 Am. Jur.2d Divorce and Separation §819 (1966). *See also* Annot., 35 A.L.R.3d 520, 560 (1971).

Spence and the paternal grandparents, appellees in this court, concede that the District Court of Forsyth had

authority to change the Georgia custody decree upon a showing of changed circumstances. However, they contend "(1) The plaintiff failed to show a change of circumstances because she did not offer any proof of what the circumstances were at the time the Georgia order was entered. . . . (2) The facts cited as justification for her having custody are irrelevant, insubstantial, and feathery. . . ." Since the greater part of the testimony covering 359 pages of the record was aimed at establishing the situation which existed at the time the Georgia decree was entered, there is no merit in appellees' first contention. We proceed on the assumption that the Georgia court was of the opinion that both Spence and plaintiff were emotionally disturbed and unstable, *and their conduct had been such that neither was then a suitable person to have custody of the children.* We can think of no other reason for the judgment the court entered.

[7] The crucial question presented by this appeal is whether the Court of Appeals erred in holding that the record contains no evidence sufficient to support Judge Clifford's finding that plaintiff is now a fit and proper person to have the custody of her children and, in their best interest, custody should now be awarded to her. If the facts which the trial judge found are supported by competent evidence they are binding on the appellate division. *Teague v. Teague,* 272 N.C. 134, 157 S.E.2d 649 (1967); *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E.2d 73 (1966); *Griffin v. Griffin,* 237 N.C. 404, 75 S.E.2d 133 (1953).

[8] We hold that competent evidence supports Judge Clifford's findings that (1) plaintiff is now emotionally stable; (2) she is successfully established in her profession in Forsyth County and surrounding areas and has an

income sufficient to support herself and her children in desirable surroundings; (3) her professional reputation and her general character are good; (4) for the five months preceding the hearing plaintiff supported and cared for the children in a home she had provided for them in a good neighborhood; (5) plaintiff is attending to their schooling, religious education, and social life and has arranged her affairs so that she is able to be with the children when they are not in school; (6) she is now a fit and proper person to have the care and custody of her children, better able to respond to their daily needs than the grandparents, and that the children's best interests require that their custody be awarded to her. Certainly these findings are sufficient to support the district court's judgement.

Nothing in this record leads us to believe that the children's best interest requires their custody to be awarded to Spence. Indeed, we are left with the impression that Spence himself is not seriously seeking the custody of his children; that his efforts are in behalf of his parents. Unemployed and living off his present wife's accounts receivable, he has started a new family and he is also under obligation to another child. Although prior to their separation the conduct of both plaintiff and Spence was inexplicable and not to be condoned, plaintiff's ability to complete an undertaking and her record of accomplishment are more impressive than his. Plaintiff has come far since 9 January 1969. Spence also has improved. However, it is plaintiff who has provided a special place for her children and is presently caring for them in the best tradition of a mother.

In 2 Nelson, Divorce and Annulment §15.09, at 226-29 (2d ed. 1961), it is said: "It is universally recognized

that the mother is the natural custodian of her young. . . . If she is a fit and proper person to have the custody of the children, other things being equal, the mother should be given their custody, in order that the children may not only receive her attention, care, supervision, and kindly advice, but also may have the advantage and benefit of a mother's love and devotion for which there is no substitute. A mother's care and influence is regarded as particularly important for children of tender age and girls of even more mature years."

[9] The trial judge obviously concluded that plaintiff had overcome her emotional problems since her separation from Spence and that the accusations made against her, if once true, were no longer valid. He found, upon supporting evidence, that she is now a stable, fit, and suitable custodian of her children, and their best interests require that their custody be awarded to her. On this record we affirm his award of custody. However, as Justice Frankfurter noted in his dissenting opinion in *Kovacs v. Brewer, supra,* changes in the fitness of custodians and their ability to provide for the needs of a child may develop rapidly. For that reason the jurisdiction of the court to protect infants is "broad, comprehensive, and plenary." *Latta v. Trustees of General Assembly of Presbyterian Church,* 213 N.C. 462, 469, 196 S.E. 862, 866 (1938). It is also continuing as long as a minor child whose custody is the subject of a decree remains within its jurisdiction. Upon motion of a party, or upon its own motion, after due notice the court may conduct a hearing to determine whether the decree should be modified. *In re Morris,* 225 N.C. 48, 33 S.E.2d 243 (1945); *Godfrey v. Godfrey,* 228 Or. 228, 364 P.2d 620 (1961); *Lawson v. Lawson,* 278 Ky. 602, 129 S.W.2d 135 (1939).

In view of the evidence in this case which dictated the drastic decree by the Georgia court in 1969, we believe that the district court's obligation to these children requires it to ascertain periodically whether conditions adversely affecting their welfare have developed. In the exercise of our supervisory powers, we so direct.

This cause is returned to the Court of Appeals to the end that it be remanded to the District Court of Forsyth County with directions (1) that at least every six months it obtain from the appropriate social service department of the county a report, made after due investigation, as to the children's condition, surroundings, and progress and also as to the plaintiff's status and condition and the manner in which she is caring for the children; and (2) that it furnish a copy of each of these reports to each party to this proceeding. Except as thus modified the judgment of the district court will be affirmed. The decision of the Court of Appeals is reversed.

Reversed.

CONCURRING OPINION,
NORTH CAROLINA SUPREME COURT

HIGGINS, Justice (concurring).

The sole question before the Court is this: Did the Court of Appeals commit error of law in reversing the decree of the Forsyth County District Court awarding the custody of Fay Frances Spence (age 10) and Dianne Jeannene Spence (age 8) to their mother?

Beyond question, I think, the district court had jurisdiction of the children and all parties necessary to the determination of their custody. The district judge heard evidence, found facts, and based thereon, entered the custody order.

These questions of law were presented to the Court of Appeals for determination: (1) Did the evidence before the trial judge support his findings; and (2) Do the findings support the custody order? If the answer to both questions is "Yes", the decision of the Court of Appeals should be reversed and the custody order should be affirmed. *Byrd v. Thompson,* 243 N.C. 271, 90 S.E.2d 394.

Article IV, Sec. 10(1), Constitution of North Carolina, provides: "The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal interference." 1 Strong, N.C. Index 2d, under the hearing Appeal and Error, lists many cases supporting the proposition that the jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference.

The Court of Appeals discussed the Georgia proceeding and the custody order to which the parties gave their consent. The decree established, as of the date of its entry, that the mother was not a suitable custodian. The decree,

however, is subject to review upon a showing of material and favorable changes in conditions. *Griffin v. Griffin,* 237 N.C. 404, 75 S.E.2d 133. Neither the judgment of the Georgia court nor the agreement of the parties can bind the court and prevent a future hearing on the question of fitness. "No agreement or contract between husband and wife will serve to deprive the court of its inherent as well as statutory authority to protect the interests and provide for the welfare of infants. . . . The child is not a party to such agreement and the parents cannot contract away the jurisdiction of the court which is always alert in the discharge of its duty toward its wards – the children of the State whose personal or property interests require protection. . . . In such case the welfare of the child is the paramount consideration . . . and the court will not suffer its authority in this regard to be either withdrawn or curtailed by any act of the parties." *Story v. Story,* 221 N.C. 114, 19 S.E.2d 136.

The Georgia decree established as of the date of its rendition the unfitness of the mother for the custody of her children. When a material and favorable change of condition does occur, the courts are open to review former orders and in light of the facts existing at the time of the review make such disposition as will be to the best interest of the children. If the court has jurisdiction, and the evidence supports the facts found, which in turn support the judgment, other questions are not presented for decision on appeal. *Bishop v. Bishop,* 245 N.C. 573, 96 S.E.2d 721. "The findings of fact by the court, there being evidence on both sides, is binding and conclusive on appeal." *Shoaf v. Frost,* 127 N.C. 306, 37 S.E. 271; In Re Hamilton, 182 N.C. 44, 108 S.E. 385.

Judge Clifford who heard the witnesses and observed their demeanor as they testified was in a favored position to ascertain the truth. He entered an interlocutory order on July 20, 1971, giving the mother temporary custody. After keeping up with the case until December 20, 1971, he entered the order now under review. The order contains the following:

"5. The two children, Fay and Dianne, while in the custody of their mother, Mrs. Susan Durham Spence, have at all times been well, fully and adequately cared for.

"6. The plaintiff, Susan Durham Spence, is a well educated and intelligent woman who has, since moving to Winston-Salem in the latter part of 1969, established a successful and growing speech therapy clinic for children and adults. She has rented and furnished a two bedroom apartment in one of the better sections of Winston-Salem which is adequate in all respects for a home for herself and Fay and Dianne. Susan Durham Spence is respected in this community by professional people with whom she deals and is a person of high character and reputation. She is an active member of Trinity Methodist Church where she participates in religious training for children and sings in the choir. She is a person exceptionally well qualified by training and experience to rear children and is in all respects a fit and proper person to have the custody of her two minor children who are subject to this action.

"7. Fay and Dianne Spence have for more than two years resided in the City of Winston-Salem except for holidays and summer vacations. All of their schooling and maintenance and upkeep while in Winston-Salem

have been paid for by their mother and maternal grandparents and their father has contributed nothing to their maintenance or schooling or upkeep since June of 1969. The two children have established excellent associations and records in school since they moved here in 1969 and their best interests will be served by their continuing to live and being schooled in this city. It is against the best interest of the children to be moved for extended periods of time and on their holidays from their primary environment. The best interest of these two minor children shall be served by their custody being awarded to their mother, Susan Durham Spence."

Notwithstanding the above, the Court of Appeals not only declared the evidence did not support the findings, but that the findings did not support the judgment.

Particularly in custody cases the trial judge not only is in a position to observe the witnesses, but in this case he observed the parent and the children in the presence of each other. Appellate courts should be slow to take over the job of re-weighing the evidence.

Under out system, appellate courts are not permitted to enter the fact finding field. They should pass on questions of law or legal inference and leave the facts and the equities to the trial court. After all, the chancellor is not given a seat on courts of appeal.

I join in Justice SHARP's opinion.

LAKE, Justice (dissenting).

I should affirm the judgment of the Court of Appeals. It reversed the judgment of the District Court of Forsyth County, thereby restoring to full force and effect the judgment of the Georgia Court concerning the custody of these two little girls.

To put this case in proper perspective it is necessary first to see exactly what the Georgia Court did and what it did not do. It must be remembered that, at the time the Georgia Court acted, the children and both parents were residents of Georgia. All parties to the present North Carolina action were before the Georgia Court, represented by counsel. All of them, through their counsel, "approved and consented to" the Georgia judgment. It was not, however, a mere perfunctory approval by the court of an agreement of the parties. It recites that it was entered "upon consideration of this case upon evidence submitted as provided by law." Counsel for the maternal grandparents, who obviously were aligned in interest with her, was her uncle. He participated in drafting the judgment.

The Georgia judgment contains no finding of fact. As the majority opinion of this Court now notes, this was, no doubt, the result of a purposeful attempt to spare the innocent children and the innocent grandparents embarrassment. Be that as it may, it has not been contended before this Court that the Georgia judgment was deficient in any respect under the law of Georgia. As such, it must be given full faith and credit by the courts of North Carolina as a determination of the then rights of the parties. Constitution of the United States, Art. IV, §1; *Allman v. Register,* 233 N.C. 531, 64 S.E.2d 861. It would, of

course, be subject to modification by the courts of North Carolina on the same basis as in Georgia. *Halvey v. Halvey*, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133; *Dees v. McKenna*, 261 N.C. 373, 134 S.E.2d 644.

The record before us does not leave in doubt the Georgia Court's reason for taking the children from the custody of their mother. In a subsequent order, entered August 23, 1971, adjudging the maternal grandparents in contempt for willful violation of its judgment, the same Georgia Court said:

"The prior misconduct and unfitness of Susan Spence to have unsupervised visitation of the children was the impelling reason for the court's approval of the parties agreement, without which such approval would not have been entered. It was restrictive and intended by the court to be restrictive so as to prevent the mother from instilling tendencies toward sexual abberations."

The Georgia judgment, after granting an absolute divorce and and in addition to detailed provisions about the property rights of the husband and wife and their debts and obligations, not pertinent to this appeal, made these provisions (summarized) concerning the custody of the two little girls, then aged 7 and 5 years:

1. The paternal grandparents (residents of Georgia) were given full custody during June, July and August of each year;

2. The maternal grandparents (residents of North Carolina) were given full custody during the school months, September through May, of each year;

3. The maternal grandparents were given the right to have the children visit them in their own home one weekend in each of the summer months;

4. The paternal grandparents were given the right to have the children visit them in their own home during school holidays – Thanksgiving, Christmas, Easter, etc.

5. The father was given the right, without restriction, to visit the children *in the home of the paternal grandparents* but he was forbidden to remove them therefrom and the paternal grandparents were ordered to prevent him from doing so;

6. The mother was given the right, without restriction, to visit the children *in the home of the maternal grandparents* but she was forbidden to remove them therefrom and the maternal grandparents were ordered to prevent her from doing so;

7. The paternal grandparents were to pay all expenses of the children while they had the custody and the maternal grandparents were to pay all the expenses of the children, including private school expense, while they had the custody;

8. Both the father and the mother were relieved of all obligations to support the children or to reimburse either set of grandparents for any expense incurred by them;

9. Inasmuch as the maternal grandparents resided in North Carolina, and so would remove the children from Georgia periodically, they were required to give a bond in the amount of $10,000, conditioned upon their complying with the judgment and "submitting themselves and

said minor children to the jurisdiction of this court for such further hearings and orders as may be heard and passed * * * as if said grandparents and said children were physically within the jurisdiction of this [Georgia] court."

It will readily be observed that the Georgia judgment did not reflect any prejudice against the North Carolina grandparents. The requirement that they post a bond was reasonable. It was designed solely to assure that the children would be returned to Georgia periodically.

It will also be observed that the Georgia judgment did not deprive the mother of the companionship of and the physical care of the children. It permitted her to be with them at will *in the home of her own parents.* There she could play with them, minister to them, cook for them, teach them, live with them nine months of each year and this she did for substantial periods prior to instituting the present action. The sole restriction was that she could not remove them from the general supervision of her own parents. This was by no means a harsh judgment. The testimony of the plaintiff, herself, in the present record shows there was ample justification for the Georgia Court's conclusion that this restriction was necessary to guard the children against the then clear and present danger of corrupt moral teaching, by example, by the mother and her chosen associates.

The wisdom of the Georgia Court's provision for the custody, care, training and maintenance of the two little girls is attested, inadvertently no doubt, by the finding of the District Court that, after the prescribed arrangement had been followed for two years, the children had "established excellent associations and records in school."

Nothing whatsoever in the record suggests any deficiency in their care, training or support while in the home of either set of grandparents.

The majority of this Court, and probably the District Court as well, appears to have been led astray by two red herrings skillfully drawn through the record: (1) The clearly established unfitness of the father to have the custody of any child, and (2) the order of the Georgia Court directing the proceeds of the forfeited compliance bond to be paid to the paternal grandparents.

Neither of these has the slightest bearing upon the question before us, which is the validity of the judgment of the Court of Appeals reinstating the Georgia judgment.

To affirm the Court of Appeals and thus restore full effect to the Georgia judgment clearly precludes the unworthy father from having custody of these children at any time. The Georgia judgment permits him to visit the children *at the home of his parents.* It expressly provides that he is "prohibited from removing the children from the home and said grandparents shall prevent the same." Nothing whatever in the record suggests that in the more than six months during which the paternal grandparents had custody of the girls they ever once failed to comply with this provision of the judgment, or that they would now do so.

It is not for us to review the Georgia Court's order finding the maternal grandparents in contempt for their failure to be equally obedient to the judgment. Nothing suggests any denial of due process of law or any departure from the applicable law of Georgia in this decree, even if we could properly review it. While it is not in

accordance with our practice to punish for contempt by levying a fine or forfeiture payable to the litigant who has been injured by the contemptuous conduct (See, *In Re Rhodes*, 65 N.C. 518; *Morris v. Whitehead*, 65 N.C. 637), such practice has long been followed in the federal courts and in the majority of the states. See: *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 108 F. 875, app. dism., 187 U.S. 427, 23 S.Ct. 211, 47 L.Ed. 244; *French v. Commercial Nat. Bank*, 79 Ill.App. 110; *Bush v. Chenault*, 12 Ky.Law Rep. 249; *Chapel v. Hull*, 60 Mich. 167, 26 N.W. 874; *Archer v. Hesse*, 164 App.Div. 493, 150 N.Y.S. 296; *Lorick v. Motley*, 69 S.C. 567, 48 S.E. 614; *Robins v. Frazier*, 5 Heisk. (Tenn.) 100; *My Laundry v. Schmeling*, 129 Wis. 597, 109 N.W. 540.

It is not for us to refuse to give effect to other judgments of courts of a sister state merely because we think their practice in reference to punishment for contempt is not as wise as our own. Certainly, a court of North Carolina should not be permitted by us to change the custody of two little girls, who have been admirably cared for by their Georgia grandparents, in reprisal for an order of forfeiture which to us may seem harsh and unwise. Nor is the amount of the forfeiture shocking. Ten thousand dollars is surely not an excessive award when the wrong done is the taking of two cherished granddaughters and the placing of them in the permanent custody of a person morally unfit to rear them.

At the time of the Georgia judgment these were Georgia children, wards of the Georgia Court. The Georgia Court was under no obligation to permit them to be brought to North Carolina. It did so in reliance upon the solemn undertaking of the maternal grandparents, "approved

and consented to" by the mother, to bring them back at the appointed time. What the District Court has done, now approved by the majority opinion, invites reprisals by the courts of Georgia, and other courts, against custody decrees of North Carolina courts in comparable cases. Inevitably, it will also make courts of other states reluctant to permit a custodian of children to bring them into this state to visit relatives or for any other purpose.

It is true, as the majority opinion states, that the courts of North Carolina are not without jurisdiction to inquire into the present needs of children within the State and to make appropriate orders concerning their present and future custody. G.S. §50-13.5. North Carolina courts have such power even though the children came here from another state whose courts have previously entered a then valid judgment as to their custody. The most elementary principles of comity, however, dictate that the courts of this State be at least as cautious about modifying the valid judgment of another state's court as they are about modifying a like decree of another North Carolina court. To do otherwise invites parties dissatisfied with the other state's judgment in a custody case to bring the children here for the fradulent purpose of evading their obligations under it and seeking sanctuary. The Georgia Court's action against the maternal grandparents on their bond was clearly due to its belief that this is what they had done. The record lends support to that view. It shows clearly that the mother, herself, intended from the beginning so to nullify the Georgia judgment.

The guiding principle in custody cases in this State, as in Georgia, is what the welfare of the children – the wards of the court – takes precedence over all else. *Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E.2d 357; *Brake v. Mills,*

270 N.C. 441, 154 S.E.2d 526; *Wilson v. Wilson,* 269 N.C. 676, 153 S.E.2d 349, *Lee, North Carolina Family Law,* § 224. It takes precedence over the welfare of the mother, over her desire to have her children in her own home, over her resentment against her own parents' court-given power to veto her wishes concerning the children, over her hostility to the paternal grandparents, over the love and concern of either set of grandparents.

When, however, a court of competent jurisdiction in this or another state has adjudged these matters, the District Court of Forsyth County is not authorized to change that adjudication merely because it would originally have entered a different decree. The custody plan previously decreed by the Georgia Court can lawfully be changed by a court of this State only for a substantial change in conditions, not because the North Carolina judge has different sociological or philosophic views from those of the Georgia Court, or because he is more sympathetic to the claimant who resides in his jurisdiction. *Shepherd v. Shepherd, supra; Stanback v. Stanback,* 266 N.C. 72, 145 S.E.2d 332. There is no such change of condition as will justify a change in the former judgment, unless it can reasonably be believe that, had the present condition existed at the earlier date, the former decree would not have been entered by the court in which it was entered. See: *Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E.2d 153; *Lee, North Carolina Family Law,* §226; 24 Am.Jur. 2d, Divorce and Separation, §819; Annot., 9 A.L.R.2d 629, §3.

It thus becomes necessary to inquire into the conditions prevailing at the time of the Georgia judgment which caused the Georgia Court to reach the drastic

conclusion that these two exceptionally promising little girls must never again be in the custody of either their father or their mother. Those conditions were known to the Georgia Court through "evidence submitted as provided by law." They were known to both sets of grandparents and, of course, to both the father and the mother. Both parents and all four grandparents "approved and consented to" the determination of the Georgia Court that the mother (like the father) was not a person into whose hands the care and training of young girls could be entrusted, in whose home the girls could be left to reside. The same Georgia Court in 1971 said its reason for its custody order was "the prior misconduct and unfitness of Susan Spence" showing danger that the mother would instill tendencies toward "sexual abberations" in the girls. Obviously, the District Court's statement to the contrary notwithstanding, the fact that the children are now 11 and 9 years of age, instead of 7 and 5, as they were then, has not lessened the danger.

The majority opinion says, quite appropriately, that the admissions of each of these parents, and corroborative evidence, establish the existence of "a situation in their home * * * which was beyond the pale of the most permissive society". The majority opinion then says: "We proceed on the *assumption* that the Georgia Court was of the opinion that both [the father] and [the mother] were *emotionally disturbed* and unstable and * * * [w]e can think of no other reason for the judgment the court entered." (Emphasis added.)

This is not correct. The record shows the Georgia Court's drastic order, approved by the plaintiff's parents, was not entered because she was "emotionslly disturbed and unstable."

It was entered because she was deemed *morally* unfit to be entrusted with the custody of two little girls. There is a great difference between these two conditions which ought not to be obscured by the use of euphemistic terms. Emotional disturbance and instability are not the same thing as moral depravity or utter lack of moral perception and principle. It is a mistake for courts to equate the two and to proceed on the assumption that absence of moral character is a mere sickness curable by psychiatric consultations and treatments.

We are dealing in this case with a subject matter unsurpassed by that of any litigation coming before this Court – the right of children to be reared in a home conducive to the development of their own character. It should not be befogged by euphemisms. It is not desirable to set out in the report of this decision all of the sordid details of the evidence supporting the Georgia judgment. However, in order to determine whether there has been a *showing* of a change on the crucial condition on which that judgment was based, we must state frankly, not euphemistically, what the condition was. It is the plaintiff mother who makes this necessary by instituting this proceeding for the purpose of nullifying the judgment to which she gave her consent and approval, however lacking in good faith that consent may now appear to have been.

There is an abundance of evidence in the record before us to show that for a substantial period of time prior to and culminating in the Georgia judgment:

1. The father habitually committed adultery, maintaining his mistress, a teenage girl, in the home where he and the mother lived with these children;

2. The mother consented to, condoned, encouraged, aided and abetted in this conduct, going so far as to turn over and go to sleep without protest when awakened by the father and his mistress engaging in sexual intercourse while in the same bed with her, and thereafter serving them breakfast in bed; and

3. The mother made homosexual advances to various teenage girls visiting in her home, sometimes in the presence of her two daughters, then mere infants, the general course of these actions being with the knowledge and consent of the father, her husband.

An especially pertinent and revealing statement by the plaintiff mother in her testimony before the District Court, and therefore bearing upon her present ideals and principles, was that she could not throw her husband's mistress out of the house because she tried to treat the mistress *"as a daughter"* and so the situation, in her mind, was "the same as if he had an affair with Dianne [one of the little girls[," in which case she "wouldn't want to throw anybody out." When, to illustrate her continuing affection for her husband's mistress, the plaintiff testifies that she could not force anyone to leave her home in order to break up an incestuous affair with her own little girl, it can hardly be said that there is substantial evidence of a change in the condition on which the Georgia judgment rests.

At the conclusion of the plaintiff's evidence the appellants moved for dismissal on two grounds: (1) The evidence showed no change of condition since the Georgia judgment; (2) this action is the culmination of a fraud on the Georgia Court. The District Court should have allowed the motion on both grounds.

The plaintiff's evidence shows beyond question that at the time she and the maternal grandparents approved and consented to the Georgia judgment and gave the bond to secure their compliance with it, it was the plaintiff's purpose and intent to get the children to North Carolina by this device and to institute an action here, in what she believed would be a more favorable judicial climate, to gain their custody. While the maternal grandparents complied with the provisions of the Georgia judgment prior to the institution of this action in the District Court of Forsyth County, the testimony of the maternal grandmother shows clearly her own sympathy with this fraudulent purpose of the plaintiff. A court of this State may not properly lend itself to the perpetration of such a fraud upon the court of a sister state.

The plaintiff's evidence shows no change in the condition on which the Georgia Court properly rested its judgment. Her testimony in this action is not that she *no longer* has homosexual tendencies. Her testimony is that she *never* had them. This is not evidence of a *change* in condition.

Her psychiatric expert witness testified on the basis of a single one-hour consultation, conducted after this action was instituted, not for treatment but solely to enable him to testify as to her present "fitness as a mother." He did not mention, and obviously could not know, her condition at the time of the Georgia judgment. The plaintiff's testimony shows she had psychological consultations not long prior to the Georgia judgment, but, for reasons not disclosed, the Georgia psychologist was not called to testify. This is not evidence of a *change* of condition.

The plaintiff's psychiatric expert witness gave the startling testimony that in his opinion homosexual tendencies in the plaintiff would have no bearing on her "fitness as a mother" to have the sole custody of two little girls. Passing over other appropriate characterizations of this "expert opinion," it suffices, for the present, to observe that it has no tendency to show any change of condition. Furthermore, the question of the plaintiff's "fitness as a mother" to have sole custody of these children is not a matter for expert opinion testimony. That is the ultimate question to be determined by the court. The Georgia Court determined it adversely to the plaintiff. Its determination is binding on the courts of this State in absence of a clear showing of a *change* in the condition on which its judgment was based. The Full Faith and Credit Clause, Art. IV, §1, of the Constitution of the United States requires more than lip service by the courts of North Carolina when called upon to disregard and change a judgment rendered by a Georgia court which had jurisdiction both over the subject mother and over the parties.

The District Court's findings of fact, assuming adequate support therefor in the evidence, do not support its judgment because they do not show any change in condition. Let us examine them, summarized and renumbered:

(1) The plaintiff is a member of the Methodist Church, participates in its activities, sings in the choir and takes the children regularly to Sunday school.

These are, per se, laudable, but they do not, per se, show she subscribed to or complies with those principles of sexual morality which, notwithstanding her psychiatric expert's contrary opinion, society generally still deems essential to

the custodian of little girls. More significant for our purposes, this finding shows *no change* in condition, for the plaintiff, herself, testified in the District Court that while living in Georgia, prior to and at the time of the Georgia judgment, she was a member of the Methodist Church and was as active in its assemblies as the then age of her children permitted.

(2) The plaintiff keeps the children clean and neat, well fed, supplied with proper toys in a "nice neighborhood," sees them across the street to and from school and spends time with them.

These too are laudable, per se, but do not, per se, show she subscribed to and complies with the above mentioned principles of morality. Again, these too are not findings of a change of condition, for the plaintiff's own testimony, not challenged by the appellants, is clear and explicit to the effect that all these things she did in Georgia before and at the time of the Georgia judgment.

(3) The plaintiff is a well educated woman.

So she is and so she was in Georgia. She had a Master's degree when living with her husband and his mistress.

(4) The plaintiff has professional competence, is well respected by her profession as a competent speech therapist and is financially successful in her practice.

So she is and so she was in Georgia while living with her husband and his mistress, according to her own testimony.

The Georgia Court tendered its judgment on the basis of an opinion, apparently not shared by the plaintiff's psychiatric expert witness, that good personal moral standards are indispensable in a fit custodian for small

girls and that professional competence, superior education, financial success, a residence in a "nice neighborhood," personal cleanliness, a neat apartment and active participation in church work do not guarantee such moral standards. This Court also has recognized the greater importance of intangible attributes of character as compared with material comforts in awarding custody of children to a relative in preference to either parent. *Brake v. Mills, supra.*

This conclusion of the Georgia Court was with the "approval and consent" of all parties before it. Its soundness is a matter of common knowledge and so an appropriate subject of judicial notice. The judgment based thereon is binding on the courts of this State until there is a clear showing of a change in condition. There is no such showing here.

It is not a light thing to take children from the custody of a mother – or of a father. The Georgia Court did not so regard it. It has been customary, when children are small, to regard the mother as the more natural custodian when divorce disrupts the home. In part this is tradition, stemming from the fact that the father is normally the provider of support and so is unable to spend as much time at home, and from the usually greater tenderness of a woman's nature. It is due in part to the imgrained habits of chivalry and to the resulting sheltered protection of women from contact with degrading influences. Now, however, a permissive society has "liberated" women, if so inclined, to inquire into, discuss, experiment with, condone and practice all of the vices which the most depraved of men have practiced since the days of Abraham. Consequently, courts of the present day must put into practice in custody cases the realism on which current society prides itself. In awarding the custody of children we must remember that the process of giving

birth does not automatically transform a woman into an exemplification of the 31st Chapter of Proverbs. This is not to negate the great truth of reformation of character, nor is it to equate isolated instances of misconduct, even gross, with lack of moral character, but in absence of evidence of a change in this fundamental condition on which the Georgia Court based its judgment the courts of this State may not properly set it aside.

The District Court, in addition to its findings of fact mentioned above, also included in its judgment the following statements which it denominated findings of fact:

"6. Susan Durham Spence * * * is in all respects a fit and proper person to have the custody of her two minor children * * *;

"7. The best interest of these two minor children shall be served by their custody being awarded to their mother * * *;

"8. The maternal grandparents Durham and the paternal grandparents Spence are all fit persons to have the custody of Fay and Dianne. All four grandparents however are of such age that the best interest of the two children will be served by awarding primary custody to their mother. * * *

"10. * * * [T]here have been substantial changes in conditions since June 2, 1969 * * * including * * *:

"a. * * * Susan Durham Spence is now a fit and proper person to have the custody of her children;

"b. Today Susan Durham Spence is a well adjusted emotionally stable individual fully capable of caring for and rearing Fay and Dianne; * * *

"d. * * * The grandparents Spence and Durham are not as able to respond to the daily needs of two small girls as they were on June 2, 1969. * * *"

Under the caption, "CONCLUSIONS OF LAW," the District Court repeated the statements:

"Susan Durham Spence is a fit and proper person to have the exclusive custody of her two minor children * * *;

"The best interest of Fay and Dianne dictate that their custody be awarded to their mother."

I have found absolutely no evidence in the record to support the finding that the Spence and Durham grandparents are no longer able by reason of age, health, financial condition or any other circumstance "to respond to the daily needs of these little girls." The Spence grandparents, at least, are begging to be allowed to do so. There is no evidence as to their age or health. The only evidence as to Mr. Durham's health is that he was unable to attend the hearing in the District Court due to a temporary illness. Both couples appear to be in as good financial condition as when they all "approved and consented to" the Georgia judgment. At the time of the Georgia judgment the little girls were 7 and 5 years of age. Now they are 11 and 9. The physical demands and strains of caring for a 5 year old are immeasurably greater than those of fulfilling the "daily needs" of a 9 year old. The needs of the maturing child are more in the realm of counselling and less in the realm of physical care and play and physical policing. There is obvious inconsistency in the District Court's saying in one breath that the grandparents are all "fit persons to have the custody" and in the next that they are too old to be permitted to have

it. This is a crucial "finding," if it be a finding. As a finding, it lacks support in the evidence. As a conclusion, it is patently erroneous for, of necessity, in view of the absence of evidence bearing thereon, it is a conclusion that no grandparents are as competent custodians as is every mother. We cannot determine to what extent the District Court rested its decree upon this wholly arbitrary and unsupported declaration. For this reason alone, if there were no other, the Court of Appeals was within its authority in reversing the judgment of the District Court.

The declarations "fit and proper person to have the custody," "best interest of these minor children" and "fully capable of caring for and rearing Fay and Dianne" are not findings of fact. As Justice Parker, later Chief Justice, said in the case of *Thomas v. Thomas*, 259 N.C. 461, 130 S.E.2d 871, and Justice Denny, later Chief Justice, said in the case of In Re Kimel, 253 N.C. 508, 512, 117 S.E.2d 409, these are conclusions of the trial judge upon the ultimate issue. There is no accepted standard for determining the "best interest" of a child with reference to his or her custodian. These are not matters which can be "found." These are matters calling for the exercise of the subjective judgment of the court. Its conclusions thereon are subject to review by the appellate court.

To say, as the majority opinion seems to intimate, that these conclusions on the ultimate, crucial question in the case are findings of fact and, therefore, not subject to review on appeal if there be the slightest competent evidence in the record to support them, makes any District Judge in North Carolina the absolute Czar in determining the custody of children. No more important litigation can come before the courts and, obviously, it is in the District Court that pressures of local social and political influences are strongest.

Furthermore, to say that, if there is *any* competent evidence to support the District Court's "finding" of good character and fitness, no appellate court can reverse a custody award based thereon is not sound in law or in policy. It is inconceivable that there will arise any contested custody case in which there will not be *some* testimony of good character and fitness of each claimant. The claimant, by his or her own testimony, can supply it and few men or women are so depraved as to be completely lacking in attractive attributes or as to be unable to find some relative or acquaintance who will testify to good character and behavior. Testimony as to character is competent in custody hearings, and so is the claimant's own denial of charges of misconduct, but neither is sufficient to put the District Court's conclusion as to "fitness" as custodian of children beyond the reach of an appellate court on review.

Custody hearings are equitable in nature, the child being the ward of the court, even though the procedure is now regulated to some degree by statute. In Re Custody of Sauls, 270 N.C. 180, 186, 154 S.E.2d 327. Lee, North Carolina Family Law, §226; Clark, Law of Domestic Relations, §17.1; Pomeroy, Equity Jurisprudence, §1307; 24 Am.Jur.2d, Divorce and Separation, §772. While, in the exercise of this equitable jurisdiction, the trial court has broad discretion and its determinations are not lightly to be set aside on appeal, the appellate court in equity has, and traditionally exercises, much more extensive powers of review than does the appellate court in law over determinations of fact. This greater power of review of the appellate court in equity extends to custody cases and to the determination therein of the fitness of claimants and the best interest of children. See: In Re Kimel, *supra;* In Re Turner, 151 N.C. 474, 479, 66 S.E. 431;

Lee, North Carolina Family Law, §224; McClintock, Handbook on the Principles of Equity, 2d Ed., §54; Nelson, Divorce and Annulment, 2d Ed., §§15.50 and 30.10; 24 Am.Jur.2d, Divorce and Separation, §779.

In its so-called Finding of Fact Number 10, purporting to show changes in condition since the Georgia judgment, the District Court injected many conclusions. The actual findings of fact therein are either not supported by the evidence or are unrelated to the condition which was the basis for the Georgia judgment. Thus, the so-called Finding of Fact Number 10 does not constitute a proper finding of a change of condition and does not afford a proper basis for the order of the District Court.

The plaintiff, by virtue of the District Court's interlocutory order awarding her the custody of the children until the hearing, had them in her custody for five months prior to the hearing. The District Court relied on absence of a showing that this five month period produced a detrimental effect on the children. The plaintiff is quite obviously a woman of intelligence, highly educated, especially adept in the field of psychological tests and measurements. She, far more than the average person, could succeed in making a favorable showing on the tests given by her psychiatric expert witness during his one hour interview with her. It is hardly surprising that during the five-month test period given her by the District Court, awaiting the hearing of her case and knowing the nature of the charges likely to be made against her, the plaintiff complied with the customary standards of society and of motherhood. Good behavior for so short an interval with so much at stake is not sufficient evidence on which to predicate a finding of a change in moral principles. To take these little girls

from the homes of grandparents under whose affectionate and watchful care they have done exceptionally well and to give them into the sole custody of this plaintiff, in view of her established record of behavior, is an abuse of the discretion vested in the District Court even if its conclusions could properly be deemed findings of fact.

We should, therefore, affirm the judgment of the Court of Appeals.

THE SUPERIOR COURT FOR THE COUNTY OF COBB, STATE OF GEORGIA

CIVIL ACTION, FILE NUMBER 26836

RONALD KENNETH SPENCE	)	
	)	FINAL JUDG-
vs	)	MENT
	)	AND DECREE
SUSAN DURHAM SPENCE	)	

Upon consideration of this case upon evidence submitted as provided by law, it is the Judgment of the Court that a total divorce be granted, that is to say a divorce a vinculo matrimonii between the parties to the above stated case, upon legal principles.

And it is considered, ordered and decreed to the court that the marriage contract heretofore entered into between the parties to this case, from and after this date, be and is set aside and dissolved as fully and effectually as if no such contract had ever been made or entered into, and plaintiff and defendant, formerly husband and wife, in the the future shall be held and considered as separate and distinct persons altogether unconnected by any nuptial union or civil contract whatsoever.

The wife herin shall have the right to remarry and the husband shall also have the right to remarry.

The Intervention's filed in this case by Mr. and Mrs. J. R. Durham, maternal grandparents and by Mr. and Mrs. R. T. Spence, paternal grandparents, are hereby allowed and said intervenors are made parties in this case.

JUDGMENT, SUPERIOR COURT,
COBB COUNTY, GEORGIA

IT IS HEREBY ORDERED that the custody of the two minor children, to-wit: Fay Frances Spence and Dianna Jeannene Spence is hereby awarded to the maternal and paternal grandparents, to-wit: Robert and Fay Durham and R. T. and Frances Spence upon terms and conditions hereinafter set forth.

The paternal grandparents Spence shall have the full custody of the said children for the summer months, June, July and August of each year and the maternal grandparents Durham shall have the full custody of said children during the school year months of September, October, November, December, January, February, March, April and May of each year. The school term shall control in the beginning and ending thereof.

During these times, the respective parent, that is to say, the plaintiff and defendant in this case may have the right to visit the children in the home of their respective parents without restriction except said respective parent shall be prohibited from removing the children from the home and said grandparents shall prevent the same.

During the summer months of June, July and August of 1969, the grandparents not having custody of said children (the Durhams) shall have the right to have said children visit in the home of these grandparents during the period of one weekend each month from 6:00 on Friday evening through Sunday following at 6:00 P.M. Unless said grandparents agree otherwise such weekend shall be deemed to be the third weekend of each summer month in 1969.

During said visiting periods said respective parent shall likewise have the privilege of visitation with the children without limitation except that said parent shall not remove said children from the home of said respective grandparents.

During the period of the school months, each year the Spences not having custody shall have the right to have said children visit in their home for the following holidays, to-wit: Easter, Thanksgiving and Christmas and any other holidays during the time that school is not in session on account of designated holidays.

IT IS HEREBY ORDERED that the grandparents concerned in receiving the children from time to time shall pay the expense of the children during that period of time, including transportation from the other grandparents home.

It is hereby deemed that both sets of grandparents, that is to say, the maternal and paternal grandparents shall be the primary custodians of said children rather than the natural parents it being agreed to by plaintiff and defendant both in open court and by virtue of this order.

During the nine-month school period while in the custody of the maternal grandparents said maternal grandparents shall maintain said children in private schools of their selection in or about Winston-Salem, North Carolina at the expense of said maternal grandparents.

IT IS FURTHER ORDERED that the said grandparents having custody at the time shall hear the complete expense of maintenance, private school education and support of said children, having complete charge, care and

custody of the children during the time the children are in the immediate care of the respective grandparents concerned, that is to say, that while the children are with the grandparents Durham the grandparents Durham would have their complete expense and care and while they are with the grandparents Spence the grandparents Spence would likewise have their complete expense and care. Neither set of grandparents would look to either of the natural parents for reimbursement of any such sums expended by said grandparents on account of or on behalf of the children and there is no obligation vested in the way of support or alimony on either of the parties, the husband and wife the natural parents. Any indebtedness heretofore incurred either by note or otherwise by the plaintiff and/or the defendant to either of the maternal and paternal grandparents is hereby cancelled and discharged.

EXCEPT AND HOWEVER IT IS HEREBY FURTHER ORDERED that if either of the grandparents Durham, that is to say, Rob or Fay Durham should die during the time that this Order is still applicable and in effect the primary custody for the nine-month period heretofore referred to shall automatically become vested in the grandparents Spence, to-wit: R. T. and Frances Spence, on the same terms and conditions as heretofore specified and the three-month or secondary custody period shall automatically become vested in the surviving Durham upon the same terms and conditions heretofore specified, provided first that both the grandparents Spence, that is to say, R. T. and Frances Spence are both themselves in life.

It is also provided that when and if one of the grandparents Spence, that is to say R. T. or Frances Spence shall die at a time when one of the grandparents Durham, to-wit: Rob or Fay Durham shall still be in life the primary or nine-month custody heretofore referred to shall be vested in the surviving Durham grandparent on the same terms and conditions heretofore expressed and the three-month custody shall be vested in the grandparent Spence on the same terms and conditions as heretofore expressed, and further should both of either set of the maternal and paternal grandparents die leaving one grandparent in life the full custody of said children shall be vested in that surviving grandparent, either Spence or Durham.

It is hereby declared to be the intention of the court to vest primary custody with the set of grandparents who are best able to maintain a home for the said children, furnishing the stability of a substituted father and mother with secondary custody in the grandparent who on account of death cannot do so under the terms and conditions herein expressed.

It is further the intent of the Court that both the maternal and paternal grandparents shall cooperate together in the rearing of said children, establishing a basis of exchange, communication, confidence, trust and stability for themselves and their said grandchildren heretofore referred to. Neither grandparent or parent shall in any way attempt to or in fact poison the mind of either or both of said children toward the other grandparent or parent and shall each refer to the other in the presence of said children and in the presence of the other grandparents in a courteous respectful manner to the best interest of said children. With the consent of all the grandparents concerned

these orders relating to custody and visitation are hereby declared to be flexible, but in the absence of complete agreement among said grandparents they are hereby declared to be inflexible.

During the time that said children are in the home of the respective grandparents concerned the other parent, that is to say the parent not the child of said grandparent having custody of the children at the time shall have no vested right to visit with said children, but said grandparents concerned may impose the terms and conditions of any visitation in said grandparents sole discretion that can under proper circumstances be exercised by said respective parent concerned. This is declared primarily with special occasions in mind, but, special occasions or not, it shall be addressed to the sound discretion of the grandparents having custody.

As between the plaintiff and defendant, it is hereby considered ordered and adjudged and decreed that said wife shall have no alimony and that each of them having heretofore already divided their personal property, judgment in accordance with their actions, declaration and agreement is hereby affirmed and each the plaintiff and defendant are hereby ordered to in a like manner to pay off the respective debts that each has incurred and that each has heretofore agreed to pay and that said debts be paid as they mature.

Ronald Spence is responsible for and shall pay the following debts: H.F.C. Moving Loan in California, Beneficial Finance, California Credit Union, May Co. of California, Crocker Citizens Bank of San Francisco, San Diego Trust & Savings Bank. $10,000.00 Note owed to Durhams cancelled.

Susan Spence is responsible for and shall pay the following debts: Portable Television, Sears of Greensboro, First & Merchant's Bank of Richmond, Bank of Virginia, New York Life Policy on Susan D. Spence, New York Life Policy on Dianna Spence, New York Life Policy on Fay Spence, New York Life Policy on Ronald Spence, Allstate Car Insurance.

It is further provided that inasmuch as the grandparents Durham are non-residents of the State of Georgia and are at present residents of the State of North Carolina, that siad grandparents Durham and each of them jointly and severally shall give bond within thirty days from the date of this decree, in the sum of ten thousand and no/100 ($10,000.00) dollars with good security thereon approved by this court or the clerk of this court conditioned upon said grandparents Durham complying with and abiding by the terms and provisions of this judgment and any future orders of this court and submitting themselves and said minor children to the jurisdiction of this court for such further hearings and orders as may be heard and passed by this court as if said grandparents and said children were physically within the jurisdiction of this court, otherwise said bond to be null and void.

The Clerk of this Court is hereby appointed agent for service on behalf of the Durhams with respect to any such proceedings regarding custody or the terms of the bond or any alleged breach thereof.

Both the plaintiff and the defendant are hereby enjoined from harrassing and molesting the other in any manner whatever.

JUDGMENT, SUPERIOR COURT
COBB COUNTY, GEORGIA

Each of the parties hereto are hereby commanded and directed to obey and abide by each of the orders and judgments herein expressed and rendered.

June 2, 1969

(L. C. Hames, Jr.)

/s/ L. C. Hames, Jr.
J.S.C.C.J.C.

Approved and Consented to:

/s/ G. Conley Ingram
Ingram & Flournoy
Attorneys for Mr. & Mrs. R. T. Spence

/s/ J. A. Cochran
J. A. Cochran
Cochran & Camp
Attorneys for Ronald Kenneth Spence

/s/ L. M. Awtrey, Jr.
L. M. Awtrey, Jr.
Edwards, Bentley, Awtrey & Parker
Attorneys for Susan Durham Spence

/s/ William W. Mundy
William W. Mundy
Mundy, Gammage & Cummings
Attorneys for Mr. & Mrs. J. R. Durham

/s/ Durard R. McDonald
Durard R. McDonald
Attorney for Mr. & Mrs. J. R. Durham

/s/ J. M. Grubbs, Jr.
J. M. Grubbs, Jr.
Attorney for Mr. & Mrs. J. R. Durham

FINAL JUDGMENT AND DECREE

Upon consideration of this case upon evidence submitted as provided by law, it is the judgment of the court that a total divorce be granted, that is to say, a divorce *a vinculo matrimonii,* between the parties to the above stated case, upon legal principles.

And it is considered, ordered and decreed by the court that the marriage contract heretofore entered into between the parties to this case, from and after this date, be and is set aside and dissolved as fully and effectually as if no such contract had ever been made or entered into, and

Plaintiff and defendant, formerly husband and wife, in the future shall be held and considered as separate and distinct persons altogether unconnected by any nuptial union or civil contract, whatsoever.

The plaintiff shall have the right to remarry and the defendant shall also have the right to remarry.

The plaintiff's maiden name is hereby restored to wit:

/s/ L. C. Hames, Jr.
J.S.C.C.J.C.

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

MR. & MRS. R. T. SPENCE, Plaintiffs	CIVIL ACTION
v.	
MR. & MRS. J. R. DURHAM, *et al*, Defendants	NO. 26,836

ORDER

The testimony of John Durham (B/E p. 60-107) is positive that the minor children involved were in the apartment of Susan Spence March 24, 1971, from 6:30 p.m. until 8:10 a.m. March 25. In the afternoon of March 25 they were escorted to the apartment of Susan Spence by the maternal grandmother who left the apartment without the children (B/E p. 77), the two children remaining overnight (B/E p. 77-78), and were taken to the maternal grandparents' home at 8 a.m. on March 26, 1971; that evening at 9 p.m. Susan Spence returned the two children to her apartment. On the morning of March 27 the children came from the apartment, unattended, played a few minutes in the snow and returned to the apartment (B/E p. 84). The movants' contention that the children's presence in the home of Susan Spence not in the supervision of the maternal grandparents Durhams is supported by the unqualified statement by Mrs. Durham that she was absent in the home of Susan Spence at those specific times referred to. The prior misconduct and unfitness of Susan Spence to have unsupervised visitation of the children was

the impelling reason for the Court's approval of the parties agreement, without which such approval would not have been entered. It was restrictive and intended by the Court to be restrictive so as to prevent the mother from instilling tendencies toward sexual aberrations. The attitude of respondants that their daughter is a fit and proper person is indicative of their intent to circumvent the plain provisions of the Court's Order.

THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED that J. R. Durham and Fay Munday Durham be and the same are adjudged to be in contempt of this Court and a fine of $200.00 is imposed against each contemptor.

IT IS FURTHER ORDERED AND DECREED that the bond required for their compliance be and the same is hereby forfeited and shall be deposited with the Sheriff, Cobb County, Georgia, subject to the further Order of this Court for dispersal.

SO ORDERED, this 23rd day of August, 1971.

/s/ L. C. Hames, Jr.
L. C. Hames, Jr.
JUDGE, COBB SUPERIOR COURT
COBB JUDICIAL CIRCUIT

SUPREME COURT OF GEORGIA

J. R. DURHAM *et al*

v.

R. T. SPENCE *et al*

No. 26861

January 6, 1972

UNDERCOFLER, Justice.

In 1969 Ronald Kenneth Spence filed a suit for divorce against Susan Durham Spence in the Superior Court of Cobb County. He sought custody of their two minor children and contended that the defendant was an unfit mother. The defendant denied the charge of unfitness and sought custody of the children and child support. Mr. and Mrs. R. T. Spence, paternal grandparents and residents of Georgia, moved to intervene in the divorce action. They alleged that neither of the parents was fit to have custody of the children. They averred that the children were presently living with them and prayed for continued custody. Mr. and Mrs. J. R. Durham, maternal grandparents and residents of North Carolina, filed a motion seeking custody of the children. The maternal and paternal grandparents were allowed to intervene in the divorce suit and were made parties. The final decree of June 2, 1969, awarded custody of the children during the school year to the maternal grandparents and during the summer months to the paternal grandparents. The plaintiff and the defendant assented to the decree. The decree further provided that the respective parent should have the right of visitation of the

children in their respective parents' home without restriction "except said respective parent shall be prohibited from removing the children from the home and the said grandparents shall prevent the same." The decree contained an express command and directed the parties to obey and abide by each of the orders and judgments expressed therein and rendered by the court. The Clerk of the Cobb Superior Court was made agent for service for Mr. and Mrs. Durham. They were also required to post a bond in the amount of $10,000. The bond was given to Kermit Sanders, Sheriff of Cobb County, and provides: "The condition of this bond is such, that said Principals shall abide the Order of the Superior Court passed in Case Number 26836 on the 2nd day of June, 1969, relating to the custody of the minor children, Fay and Dianne Spence, and toward that end said principals shall submit themselves to the jurisdiction of the Superior Court of Cobb County, Georgia and the minor children above named for the purpose of any hearings and orders that may or can be legally passed and heard hereafter as if said Robert and Fay Durham were physically within the jurisdiction of said court. Should said provisions not be kept, then this bond to be forfeit, but otherwise said bond shall become null and void."

On June 3, 1971, Ronald Kenneth Spence and Mr. and Mrs. R. T. Spence filed an application for attachment for contempt and sought to require the maternal grandparents, Mr. and Mrs. J. R. Durham, to deliver the children to them and show cause why they should not be held in contempt of court for violating the divorce decree by allowing the mother to remove the children from their home.

On June 3, 1971, Mr. and Mrs. R. T. Spence filed an application for forfeiture of bond against Mr. and Mrs. J.R.

Durham, General Insurance Company of America and Kermit Sanders, Sheriff of Cobb County. The application contends that Mr. and Mrs. Durham had wilfully breached the conditions of the bond by allowing Susan Durham Spence to remove the children from their home in violation of the order of the court, and that they further wilfully breached the conditions of the bond in wilfully refusing to deliver the children to the paternal grandparents for the months of June, July and August 1971, as required by the order of the court.

Mr. and Mrs. J. R. Durham filed an answer to the application for contempt and denied the allegations of the petition. They contended that the court order sought to be enforced had been superseded by an order of the Superior Court of Forsyth County, North Carolina, which prohibited them from removing the children from Forsyth County, North Carolina. They also sought to have the application for contempt dismissed on various grounds. Mr. and Mrs. J. R. Durham and General Insurance Company filed an answer to the application for forfeiture of the bond in which they contended that the respondents had not wilfully nor contemptuously violated the terms of the court's order and that their failure to deliver the children was due to the order of the North Carolina court. They also moved to dismiss the application for forfeiture of the bond on various grounds.

Kermit Sanders, Sheriff of Cobb County, filed pleadings in the suit.

After hearing evidence, the trial court held that Mr. and Mrs. J. R. Durham had deliberately violated the court's decree. The trial court fined the defendants $200 each and forfeited the bond they had given.

The defendants appeal to the court.
Held:

[1] 1. The appellants contend that there is no provision of law which allows the appellees to bring an action for contempt and forfeiture of bond against them because they were not parties to the divorce proceedings.

The record shows that the nonresident appellants petitioned the court to intervene in the divorce case, were made parties to the cause, accepted custodial benefits of the grandchildren which they had sought, consented to a judgment in Georgia requiring them to obey its provisions, filed the bond specified in the judgment, and returned with the children to North Carolina.

[2] It is settled in this State that, "One cannot complain of a judgment, order, or ruling that his own procedure or conduct procured or aided in causing." *Bennett v. Bennett,* 210 Ga. 721(2), 82 S.E.2d 653; *Turner v. McGee,* 217 Ga. 769, 772, 125 S.E.2d 36; *Dance v. Smith,* 223 Ga. 328(1), 155 S.E.2d 10.

The mother of the children is not a necessary party to this proceeding. None of the mother's rights are in issue. The only question presented is whether the maternal grandparents violated the court's order.

There is no merit in enumeration of error No. 1.

[3] 2. Enumerations of error 2 and 3 contend that the Cobb Superior Court had no jurisdiction to hear the applications for contempt and forfeiture of bond because jurisdiction of the Forsyth County, North Carolina court had superseded that of the Cobb County court.

The record shows that the divorce judgment was entered on June 2, 1969.

On May 25, 1971 Susan Durham Spence filed a proceeding in the Superior Court of Forsyth County, North Carolina, against Ronald Kenneth Spence, Mr. and Mrs. J. R. Durham and Mr. and Mrs. R. T. Spence, seeking to change the custody award entered by the Cobb Superior Court.

The order of the trial judge shows that the facts and circumstances on which he based his judgment occurred prior to May 25, 1971. Therefore, the subsequent proceedings in the North Carolina court had no effect on the contempt judgment.

These enumerations of error are without merit.

[4] 3. Enumerations of error Nos. 4, 5, 6, 8, 9, 10, 11, 16, 17, 18, 19, 20, 21 and 22 relate to the sufficiency of the evidence to support the judgment in the attachment for contempt and forfeiture of the bond proceedings. The appellants contend that the appellees were required to prove their case by more than a preponderance of evidence.

The judgment in the divorce decree awarding custody of the children provided: "During these times, the respective parent, that is the plaintiff and the defendant in this case, may have the right to visit the children in the home of their respective parents without restriction except said respective parent shall be prohibited from removing the children from the home and *said grandparents shall prevent the same.*" (Emphasis supplied).

This portion of the judgment specifically required the grandparents to prevent the removal of the children from their homes.

The trial court's order stated: "The testimony of John Durham [a private investigator] is positive that the minor children involved were in the apartment of Susan Spence

March 24, 1971 from 6:30 p.m. until 8:10 a.m. March 25. In the afternoon of March 25 they were escorted to the apartment of Susan Spence by the maternal grandmother who left the apartment without the children, the two children remaining overnight, and were taken to the maternal grandparents' home at 8 a.m. on March 26, 1971; that evening at 9 p.m. Susan Spence returned the two children to her apartment. On the morning of March 27 the children came from the apartment, unattended, played a few minutes in the snow and returned to the apartment. The movants' contention that the children's presence in the home of Susan Spence not in the supervision of the maternal grandparents Durhams is supported by the unqualified statement by Mrs. Durham that she was absent in the home of Susan Spence at those specific times referred to. The prior misconduct and unfitness of Susan Spence to have unsupervised visitation of the children was the impelling reason for the court's approval of the parties' agreement, without which, such approval would not have been entered. It was restrictive and intended by the court to be restrictive so as to prevent the mother from instilling tendencies toward sexual aberrations. The attitude of respondents that their daughter is a fit and proper person is indicative of their intent to circumvent the plain provisions of the court's order."

Mr. J. R. Durham testified by deposition that Mrs. Durham was primarily the motivating factor in handling the conduct and affairs of the grandchildren.

In *Patten v. Miller,* 190 Ga. 152(5), 8 S.E.2d 786, it was held: "Whether a contempt of court has been committed in the violation of an injunctive order, and how it shall be treated, are questions for the discretion and judgment of the court that issued the order, and its decision

will not be interfered with by this court unless there is an abuse of discretion. If there be any evidence from which the judge could have concluded that his order had been violated, this court, under the above rule, has no power to disturb his judgment."

(a) In *Pedigo v. Celanese Corporation of America*, 205 Ga. 392, 54 S.E.2d 252, this court held that the preponderance-of-evidence rule applies in cases brought for contempt in disobeying an injunctive order.

(b) The evidence in this case was sufficient to support the judgment of the trial court on the contempt and forfeiture-of-bond applications against Mr. and Mrs. J. R. Durham.

There is no merit in these enumerations of error.

[5] 4. Enumeration of error No. 7 contends that the judgment of the trial court was error because the order of the court sought to be enforced merely stated the rights of the intervenors and contained no mandatory direction to them to abide by said order and therefore such an application for contempt and application for forfeiture of bond will not lie under law.

The final judgment in the divorce proceedings made the intervenors parties to the action. The decree made the grandparents custodians of the children and provided that during the periods of their respective custody: "the respective parent, that is to say, the plaintiff and the defendant in this case, may have the right to visit the children in the home of their respective parents without restriction except said respective parent shall be prohibited from removing the children from the home and said grandparents shall prevent the same . . . Each of the parties

hereto are hereby commanded and directed to obey and abide by each of the orders and judgments herein expressed and rendered." The bond provided: "Should said provisions [of the divorce decree of June 2, 1969] not be kept, then this bond to be forfeit, but otherwise said bond shall become null and void."

The final divorce decree specifically required the respective grandparents to prevent the removal of the children from their home by their respective parent and the bond was conditioned on this decree.

This enumeration of error is without merit.

[6] 5. Enumeration of error No. 12 contends that the paternal grandparents could not bring this application to forfeit the bond but that the Sheriff of Cobb County, the obligee in said bond, was the necessary party plaintiff.

This enumeration of error is without merit. The appellees were parties to the original decree and have custodial rights thereunder. They have a legitimate interest in seeing that the terms of the decree are obeyed. The obligee of said bond, Kermit Sanders, Sheriff of Cobb County, was a party to the proceedings. See Code Ann. §81A-117(a). Ga.L.1966, pp. 609, 629.

[7, 8] 6. Enumeration of error No. 13 contends that the bond is invalid and unenforceable as an attempt to retain jurisdiction over appellants and the children. This contention is without merit. The bond is for the purpose of securing compliance with the court's order and not for the purpose of retaining jurisdiction. *Pruitt v. Butterfield*, 189 Ga. 593, 6 S.E.2d 786; *Good v. Good*, 205 Ga. 112(1), 52 S.E.2d 610; and *Brown v. Goodloe*, 215 Ga. 755(2), 113 S.E.2d 393. It is well settled in this State that the

trial court can not retain jurisdiction in the final divorce decree. *Martin v. Hendon,* 224 Ga. 221(1), 160 S.E.2d 893.

[9] 7. Enumeration of error No. 14 contends that "the event adjudged by the said court to be contemptuous is not reasonably related to the forfeiture of the bond and said forfeiture could not have been the intent of the original trial court."

We do not agree. The order provides: "It is further provided that inasmuch as the grandparents Durham are non-residents of the State of Georgia and are at present residents of the State of North Carolina, that said grandparents Durham and each of them jointly and severally shall give bond within thirty days of this decree in the sum of ten thousand and no/100 ($10,000) dollars with good security thereon approved by this court or the clerk of this court conditioned upon said grandparents Durham complying with and abiding by the terms and provisions of this judgment . . ." The bond is so conditioned. See 42 Am.Jur.2d 53, §52. In our opinion the court intended that the appellants would abide the entire order of the court and not just the provision requiring the return of the children to Georgia so long as the order was valid and not superseded by a later order of a court obtaining lawful jurisdiction. The trial court's order here is based upon a violation of its order before the North Carolina court assumed jurisdiction of the children and gave their temporary custody to the mother and enjoined their removal from North Carolina.

There is no merit in this enumeration of error.

[10] 8. Enumeration of error No. 15 contends that the trial court did not have jurisdiction to enforce the

bond under the circumstances of this case. This enumeration of error is without merit. Since the courts of this State have the authority to require the bond of non residents, they have the authority to forfeit it upon a proper showing.

[11] 9. Enumeration of error No. 23 contends that the finding of contempt with a fine and the forfeiture of the bond constitute "excessive plenary action" and penalizes appellants twice contrary to law. We do not agree. The punishment for contempt and the posting of bond upon awarding custody of children to non residents are authorized and the penalties being so authorized we see no reason why both cannot be imposed. Code §24-2615 (5); *Pruitt v. Butterfield*, 189 Ga. 593, 6 S.E.2d 786; *Good v. Good*, 205 Ga. 112(1), 52 S.E.2d 610; *Brown v. Goodloe*, 215 Ga. 755(2), 113 S.E.2d 393.

Judgment affirmed.

All the Justices concur, except HAWES, J., who concurs in the judgment only.

Rehearing Denied, Feb. 11, 1972.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-910

RICHARD T. SPENCE and wife,
FRANCES HAWKINS SPENCE, and
RONALD KENNETH SPENCE,
Petitioners,

v.

SUSAN DURHAM SPENCE,
JAMES ROBERT DURHAM and wife,
FAYE MUNDY DURHAM,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR RESPONDENTS, JAMES ROBERT DURHAM and wife, FAYE MUNDY DURHAM, IN OPPOSITION

W. P. SANDRIDGE
Post Office Drawer 84
Winston-Salem, N. C. 27102
Counsel for Respondents

Hutchison-Allgood Printing Co. — Winston-Salem, N. C.

INDEX

	Page
OPINIONS BELOW	2
QUESTIONS PRESENTED	2
STATEMENT OF FACTS	3
JURISDICTION	3
Decree Sought to be Reviewed	6
Rehearing	6
Statutory Provision	6
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	6
Federal Statute	6
United States Constitution	7
North Carolina Statutes	7
ARGUMENT	8
Summary of Argument	8
Body of Argument	8
North Carolina Procedure	16
CONCLUSION	17

AUTHORITIES CITED

Table of Cases:

	Page
Durley v. Mayo, 351 U.S. 277, 100 L. ed. 1178 (1955)	4
Ford v. Ford, 371 U.S. 187, 9 L. ed. 2d 240 (1962)	5, 9, 10
Holmes v. Holmes, 211 Ga. 827, 89 S.E. 2d 194 (1955)	10
Kovacs v. Brewer, 356 U.S. 604, 2 L. ed. 2d 1008 (1958)	5, 9
New York ex rel. Halvey v. Halvey, 330 U.S. 610, 91 L. ed. 1133 (1947)	5, 8, 9
Shepherd v. Shepherd, 273 N.C. 71, 159 S.E. 2d 357 (1968)	10
Spence v. Durham, 283 N.C. 671, 198 S.E. 2d 537 (1973)	10, 11
Wilson v. Wilson, 269 N.C. 676, 153 S.E. 2d 349 (1967)	10

Constitutional Provisions:

Constitution of the United States, Article IV, § 1	3, 7

Statutes

28 USC §1257	3, 6
North Carolina General Statutes §50-13.5(c) (2)	7, 16
North Carolina General Statutes §50-13.7	7, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-910

RICHARD T. SPENCE and wife,
FRANCES HAWKINS SPENCE, and
RONALD KENNETH SPENCE,
Petitioners,

v.

SUSAN DURHAM SPENCE,
JAMES ROBERT DURHAM and wife,
FAYE MUNDY DURHAM,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR RESPONDENTS, JAMES ROBERT DURHAM and wife, FAYE MUNDY DURHAM, IN OPPOSITION

These Respondents, James Robert Durham and wife, Faye Mundy Durham, file this separate brief opposing the Petition for Certiorari.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 283 N. C. 671, 198 S. E. 2d 537 (August 31, 1973); the opinion of the Court of Appeals of North Carolina is reported at 16 N. C. App. 372, 191 S. E. 2d 903 (October 25, 1972); the opinion of the Supreme Court of Georgia is reported at 228 Ga. 529, 186 S. E. 2d 723 (January 6, 1972, rehearing denied February 11, 1972). The judgments and orders of the Forsyth County, North Carolina District Court and the Cobb County, Georgia Superior Court are not reported.

The Petition for Certiorari was filed December 10, 1973, but was not received by counsel for the Respondents, James Robert Durham and wife, Faye Mundy Durham, until December 13, 1973.

QUESTIONS PRESENTED

1. Is there a federal question properly presented to this Court by the Petition for Certiorari?

2. May the Courts of North Carolina, without violating the Full Faith and Credit Clause, Article IV, §1 of the Constitution of the United States, enter a decree changing custody of minor daughters from that of their grandparents, as provided in a Georgia decree entered more than two years earlier, to the custody of their mother, based on a change of circumstances when the minor children are physically present in North Carolina and in the custody of grandparents in North Carolina and when all parties concerned are within the jurisdiction of North Carolina?

STATEMENT OF FACTS

These Respondents agree generally with the statement of facts appearing in the Petition for Certiorari except that:

1. There is no evidence that the Respondent, Susan Durham Spence, moved to North Carolina for the express purpose of relitigating the custody of the children as stated on page 6 of the Petition for Certiorari. These Respondents have no reason to believe that this is true.

2. It is not correct that there was no evidence before the North Carolina Court showing changes of circumstances as stated on page 7 of the Petition for Certiorari.

3. These Respondents do not believe that the modification made by the Supreme Court of North Carolina in the decree of the Forsyth County District Court indicated any doubt on the part of the Supreme Court of North Carolina in its opinion and judgment, as stated on page 8 of the Petition for Certiorari.

JURISDICTION

There is no doubt that this court has jurisdiction to review by writ of certiorari a decree of the Supreme Court of North Carolina if the validity of that decree is drawn in question on the ground that it is repugnant to the Constitution of the United States. 28 USC §1257.

The Petitioners assert that the decree of the Supreme Court of North Carolina is repugnant to the Full Faith and Credit Clause of the Constitution of the United States, Article IV, §1.

The real question is whether a child custody decree entered by the courts of one state is such a decree requiring full faith and credit by the courts of a sister state.

For any decree of the courts of one state to be protected by the Full Faith and Credit Clause, the question must be raised in the highest court of the state.

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented *to the highest court of the State* having jurisdiction and that its decision of the federal question was necessary to its determination of the cause." *Durley v. Mayo*, 351 U.S. 277, 100 L. ed. 1178 at 1183 (1955), rehearing den. 352 U.S. 859, 1 L. ed. 2d 69 (1956). (Italics supplied)

In the Supreme Court of North Carolina, the present Petitioners (among the defendants in the North Carolina courts) expressly conceded that the North Carolina trial court had authority to change the Georgia custody decree upon a showing of changed circumstances.

> "Spence [the father] and the paternal grandparents, appellees in this court, conceded that the District Court of Forsyth County had authority to change the Georgia custody decree upon a showing of changed circumstance." (Opinion of the Supreme Court of North Carolina, Petitioners' Appendix, pp. 35a-36a)

This left no *federal question* before the Supreme Court of North Carolina. The only questions left before the Supreme Court of North Carolina, aside from questions relating to the admission and exclusion of evidence and the like, were whether there had been a change of circumstances and whether those changed circumstances supported the custody decree rendered by the North Carolina trial court. These are not federal questions.

These Respondents question whether *any* child custody decree, because of its ephemeral nature, depending for its continued validity upon the welfare of the child at any particular time, is such a decree as is protected by the Full Faith and Credit Clause of the Constitution of the United States. This question has been expressly reserved by this court in *New York ex. rel. Halvey v. Halvey,* 330 U.S. 610, 91 L. ed. 1133 at 1136 (1947); *Kovacs v. Brewer,* 356 U.S. 604, 2 L. ed. 2d 1008 (1958); *Ford v. Ford,* 371 U.S. 187, 9 L. ed. 2d 240 (1962).

In any event, the Petitioners have not complied with the requirements of Rule 23-1(f) requiring that if review of the judgment of a state court is sought, "the statement of the case shall also specify the stage in the proceedings in the court of first instance *and in the appellate court,* at which, and the manner in which, the federal questions sought to be reviewed were raised; ° ° ° with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.*" (Italics supplied.)

The careful attorney for the Petitioners has failed to do this but has merely stated, "The full faith and credit issue was raised by the petitioners in their pleadings, and was reiterated at trial and before both appellate courts." (Petition for Certiorari, p. 8) The failure of the petition for certiorari to comply with Rule 23-1(f) in this respect was probably not an oversight. Compliance with the rule could not have demonstrated that a federal question was presented in the Supreme Court of North Carolina.

Decree Sought to be Reviewed

The decree sought to be reviewed was entered by the District Court of Forsyth County, North Carolina, on June 2, 1969. It was affirmed (with a modification not material here) by the Supreme Court of North Carolina on August 31, 1973.

Rehearing

No effort was made by the Petitioners to obtain a rehearing in the Supreme Court of North Carolina.

Statutory Provision

The statutory provision relied upon by the Petitioners and believed by them to confer on this Court jurisdiction to review the judgment of the Supreme Court of North Carolina is 28 USC §1257. These Respondents contend that neither this provision of the United States Code nor any other provision confers on this Court jurisdiction to review the judgment of the Supreme Court of North Carolina under the circumstances of this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Statute

28 USC §1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . . . .

"(3) By writ of certiorari, . . . where the validity of a State statute is drawn in question on the

ground of its being repugnant to the Constitution, . . . or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, . . ." June 25, 1948, c. 646, 62 Stat. 929

United States Constitution

Article IV, §1:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. . . ."

North Carolina Statutes

General Statute 50-13.5(c) (2):

"The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child when:

"a. The minor child resides, has his domicile, or is physically present in this State, or

"b. When the court has personal jurisdiction of the person, agency, organization, or institution having actual care, control and custody of the minor child."

General Statute 50-13.7:

"*Modification of order for child support or custody.* —

. . . . . .

("b) When an order for custody or support, or both, of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for sup-

port or custody which modifies or supersedes such order for custody or support."

ARGUMENT

Summary of Argument

The Full Faith and Credit Clause of the Constitution of the United States does not prevent the state of the forum (North Carolina) from changing a child custody decree if the law of the state where it was rendered (Georgia) permits a change under similar circumstances. The law of Georgia permits a child custody decree rendered by its own courts to be changed if the circumstances change. The North Carolina Court, after a full and complete hearing, and with jurisdiction over the identical parties involved in the Georgia decree and with the children physically within North Carolina, determined that there had been a change of circumstances since the Georgia decree. Therefore, the judgment of the North Carolina Court, sustained by the highest court of North Carolina, is a valid judgment.

Body of Argument

1. This Court has specifically held that if the court of one state is empowered to alter its own child custody decree upon a showing of changed circumstances, the courts of another state may modify the decree upon the same grounds.

In *New York ex. rel. Halvey v. Halvey,* 330 U. S. 610, 91 L. ed. 1133 at p. 1136 of L. ed. (1947), this Court said:

> "So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. Article 4, §1 of the Constitution provides that 'Full Faith and Credit

> shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.' * * *
>
> "The general rule is that this command requires the judgment of a sister State to be given full, not partial, credit in the State of the forum. (citing cases) But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered. * * * Whatever may be the authority of a State to undermine a judgment of a sister State on grounds not cognizable in the State where the judgment was rendered (citing case), *it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.*" (Italics supplied.)

The same question was before this Court in *Kovacs v. Brewer*, 356 U. S. 604, 2 L. ed. 1008 (1958), where this Court (quoting in part from *New York ex rel. Halvey v. Halvey, supra*), said at page 1012 of Lawyers Edition:

> "Whatever effect the Full Faith and Credit Clause may have with respect to custody decrees, it is clear, as the Court stated in *Halvey* 'that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it is rendered.'"

Still later, the same question came before this Court in *Ford v. Ford*, 371 U. S. 187, 9 L. ed. 2d 240 (1962), where the Court said at page 244 of Lawyers Edition:

> "The Full Faith and Credit Clause, if applicable to a custody decree, would require South Carolina to recognize the Virginia order as binding *only if a Virginia court would be bound by it.*" (Italics supplied.)

This Court has reserved the question of whether a child custody decree, even without a change of circumstances, is required to be given full faith and credit in the courts of a sister state. *New York ex rel. Halvey v. Halvey, supra; Kovacs v. Brewer, supra; Ford v. Ford, supra.*

2. It is the law of Georgia that a child custody decree determines only the *present* rights of the parties under the circumstances then existing and is subject to judicial change upon a change of circumstances affecting the welfare of the child. In *Holmes v. Holmes,* 211 Ga. 827, 89 S. E. 2d 194 (1955), the Supreme Court of Georgia said at page 195 of the Southeastern Reporter:

> "A decree of divorce in which the custody of a child or children is awarded to one of the parents is conclusive as between the parties to the decree as to the right of that parent to the custody of the child or children, *unless a change of circumstances materially affecting the interest and welfare of the child or children is shown to have arisen since the date of the decree.*"

Twelve Georgia cases are cited following the above quotation.

While it is not necessary to this line of reasoning, the law of North Carolina is to the same effect. *Shepherd v. Shepherd,* 273 N. C. 71, 159 S. E. 2d 357 (1968); *Wilson v. Wilson,* 269 N. C. 676, 153 S. E. 2d 349 (1967); *Spence v.*

Durham (the present case), 283 N. C. 671, 198 S. E. 2d 537 (1973).*

In both North Carolina and Georgia, the rule is that the welfare of the child whose custody is in controversy is "the polar star by which the courts must be guided in awarding custody." Mr. Justice Black, in *Ford v. Ford, supra,* referred at page 244 of the Lawyers Edition to the requirement that the child's interest must be put first as probably the law of every State of the Union.

The position taken by the Petitioners in the trial court in North Carolina conceded that the North Carolina court had the power to change the Georgia custody decree if there had been a change of circumstances.

> "Spence and the paternal grandparents, appellees in this court, concede that the District Court of Forsyth had authority to change the Georgia custody decree upon a showing of changed circumstances. However, they contend '(1) The plaintiff failed to show a change of circumstances because she did not offer any proof of what the circumstances were at the time the Georgia order was entered * * * (2) The facts cited as justification for her having custody are irrelevant, insubstantial, and feathery. * * *" (From the opinion of the Supreme Court of North Carolina, Petitioner's Appendix, pp. 35a-36a.)

The Supreme Court of North Carolina disposed of this contention as follows:

---

*The opinion of the Supreme Court of North Carolina in the present case is copied beginning at page 18a of the Appendix to the Petition for Writ of Certiorari. See page 34a of the Appendix where the Court cites numerous cases both from North Carolina and Georgia in support of this proposition.

"Since the greater part of the testimony covering 359 pages of the record was aimed at establishing the situation which existed at the time the Georgia decree was entered, there is no merit in appellees' first contention." (From the opinion of the Supreme Court of North Carolina, Petitioners' Appendix, p. 36a.)

3. There had been a change of circumstances. The Georgia Court heard no evidence and made no findings of fact before entering its decree. Therefore, it was necessary for the North Carolina trial court to take evidence as to the conditions existing at the time of and leading up to the Georgia decree. That there had been a change of circumstances since the Georgia decree was rendered is shown by the following:

(a) The Georgia decree was entered June 2, 1969. The judgment of the North Carolina trial court was rendered September 29, 1971, more than two years thereafter. There was ample *time* for a change of circumstances to occur.

(b) The Petitioner Ronald Kenneth Spence (father of the children) and the Respondent Susan Durham Spence (mother of the children) were both consulting psychiatrists during a period shortly before the entry of the Georgia decree and when the condition in their home was, in the language of the Supreme Court of North Carolina, "beyond the pale of the most permissive society." (Petitioners' Appendix, p. 25a)

(c) The Petitioner Ronald Kenneth Spence (father of the children) expressed the opinion that his wife "was disqualified as a custodian only because she was not sufficiently stable over a sufficiently long period of time to guarantee the children 'a consistent environment.'" (Peti-

tioners' Appendix, p. 26a) The children have been in the sole custody of their mother in Winston-Salem, North Carolina, since July 20, 1971, and for the period between September, 1970, and July 20, 1971, the children were in Winston-Salem in the custody of their maternal grandparents under the Georgia decree subject to visitation rights by the mother. There was a period, therefore, of approximately a year in which the North Carolina trial court was able to take direct testimony as to the stability of the mother. (Petitioners' Appendix, pp. 24a-25a)

(d) The Petitioners insist that the mother, Susan Durham Spence, was unfiit to have custody of the children because she was a homosexual and that this fact was known to the Georgia Court at the time it entered its decree. Two doctors testified for the mother in the North Carolina trial court. One, Dr. Richard C. Proctor, head of the Department of Psychiatry at the Bowman Gray School of Medicine, testified that he had examined the mother in March, 1971, and that he could find no indication of abnormal tendencies and that, in his opinion, she would be a competent and capable mother able to assume the responsibility of rearing her children in a satisfactory manner and that one could readily have such a disorder in 1968 without its being present in 1971. (Petitioners' Appendix, p. 29a)

The other, Dr. David Allen Hill, a clinical psychologist on the faculty of Wake Forest University, examined the mother for the purpose of testifying, and cautioned her before the examination that his tests might reflect unfavorably upon her. After administering a series of eight tests, Dr. Hill concluded that she was "in the ordinary sense of the word a normal individual," showing "normal female interests in work and hobby and relating to people," and that she enjoyed working with children. He found no evidence of a personality pattern consistent with sexual devi-

ancy, prolonged promiscuity, or peculiar behavior. He was of the opinion that in submitting herself to these tests, she attempted to present herself in "as positive and as honest a light as she could." (Petitioners' Appendix, p. 28a)

(e) The mother is a clinical speech pathologist certified by the American Speech and Hearing Association. (Petitioners' Appendix, p. 27a)

(f) She is head of the Speech Pathology Department at the Medicenter's Winston-Salem facility where she gives therapy of all types to patients with speech afflictions and conducts an out-patient clinic in which she gives speech therapy to both children and adults in the entire Forsyth County (Winston-Salem's county) area, and sees patients from the nearby cities of Greensboro, Salisbury, High Point, Statesville and Lexington and that 45% of her patients are children. (Petitioners' Appendix, p. 27a)

(g) The mother is now residing in an appropriate home on Country Club Road directly across the street from the children's school in the Trinity Methodist Church. She walks the children across the street to school before going to work in the mornings and returns to pick them up at 3:00 in the afternoon. (Petitioners' Appendix, p. 28a)

(h) The mother is herself an active member of the Trinity Methodist Church, sings in its choir, and participates in church functions. (Petitioners' Appendix, p. 28a)

(i) The children sing in the children's choir of the Trinity Methodist Church and do superior work in the private school housed in the Trinity Methodist Church. (Petitioners' Appendix, p. 28a)

(j) The Plaintiff offered evidence that her good character and reputation in the community were good. The pastor of her church testified that he had known the mother

since June, 1970, and had observed her with the children and that they had a happy and normal relationship and the children seemed well adjusted. (Petitioners' Appendix, p. 29a)

(k) The Petitioner, Ronald Kenneth Spence, had employed detectives to observe the plaintiff to find out what her circumstances were and to discover whether she was engaged in any abnormal conduct. It is significant that these detectives were not called in the North Carolina trial as witnesses against the mother. (Petitioners' Appendix, p. 29a)

(l) The children's maternal grandparents, Respondents James Robert Durham and his wife, Faye Mundy Durham, from whose custody the children were taken by the decree of the North Carolina Court, supported the contention of their daughter, who was the mother of the children, that she should have their custody.* (Petitioners' Appendix, pp. 26a-27a)

There was ample evidence, therefore, as the Supreme Court of North Carolina concluded, to support the findings of fact made by the North Carolina trial court (briefly summarized above) and its conclusion that the mother "is now a fit and proper person to have custody of her children" and that "the conditions surrounding the parties have changed so substantially that the best interests of the children require the judgment [the Georgia judgment] be

*Although supporting the mother's action to obtain custody of the children, the maternal grandparents had no advance knowledge of the mother's suit to obtain custody. The North Carolina suit did not begin as a collusive proceeding between the Respondent, Susan Durham Spence (plaintiff in the North Carolina suit) and her parents (Respondents James Robert Durham and wife, Faye Mundy Durham), among the defendants in the North Carolina suit. (Petitioners' Appendix, p. 24a)

altered by awarding their custody to their mother." (Petitioners' Appendix, pp. 31a-32a)

The Court should note that the Supreme Court of North Carolina recognized that the mother's continued fitness as custodian of her children should be monitored and, while generally affirming the judgment of the trial court awarding custody to the mother, it directed the District Court of Forsyth County at least every six months to obtain from the appropriate social service department of the county a report made after due investigation as to the children's condition, surroundings and progress and as to their mother's status and condition and the manner in which she is caring for her children and that a copy of such report be furnished to all parties to the proceeding – that is to say, the father of the children, the maternal grandparents, and the paternal grandparents.

North Carolina Procedure

North Carolina General Statutes §50-13.5(c)(2) gives to the North Carolina courts jurisdiction to enter child custoday decrees when the child is physically present in the state or when the North Carolina court has personal jurisdiction of the person having custody of the child.

North Carolina General Statutes §50-13.7 expressly authorizes the courts of North Carolina, upon gaining jurisdiction [under General Statutes §50-13.5(c)(2)] and upon a showing of changed circumstances, to change child custoday decrees rendered by a court of another state.

The parties before this Court, Petitioners and Respondents, are the identical parties who were before the courts in Georgia and in North Carolina. The children were physically in Georgia at the time the Georgia decree was entered as were their custodians, and the children were physi-

cally present in North Carolina (and had been for about a year) when the North Carolina decree was entered, as were their custodians. There is no question, therefore, but that, so far as North Carolina procedure was concerned, the North Carolina case was properly constituted and properly before the North Carolina courts. All parties were represented by counsel in both the Georgia proceedings and in the North Carolina proceedings, and in the North Carolina proceedings, all parties were present at the trial and actively participated in the trial except the maternal grandfather, James Robert Durham, who was ill at the time of the trial.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

W. P. SANDRIDGE
Post Office Drawer 84
Winston-Salem, N. C. 27102
Telephone: AC 919 725-1311

Counsel for Respondents, James Robert Durham and wife, Faye Mundy Durham

Of Counsel:

Womble, Carlyle, Sandridge & Rice
Post Office Drawer 84
Winston-Salem, N. C. 27102

SUPREME COURT, U. S.

Jul 1974

MANUEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-910

RICHARD T. SPENCE and wife, FRANCES HAWKINS SPENCE, and RONALD KENNETH SPENCE,

Petitioners,

v.

SUSAN DURHAM SPENCE, JAMES ROBERT DURHAM and wife, FAYE MUNDY DURHAM,

Respondents.

Petition for Writ of Certiorari to
The Supreme Court of North Carolina

BRIEF FOR RESPONDENT, SUSAN DURHAM SPENCE, IN OPPOSITION

NORWOOD ROBINSON

Hudson, Petree, Stockton, Stockton and Robinson

610 Reynolds Building
Winston-Salem, North Carolina 27101

FRED G. CRUMPLER, JR.
MICHAEL J. LEWIS

White and Crumpler

2616 Wachovia Building
Winston-Salem, North Carolina 27101

Counsel for Respondent Susan Durham Spence

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

	Page
JURISDICTION	1
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF FACTS	3
ARGUMENT	7
CONCLUSION	11

TABLE OF CITATIONS

Cases:

In Re Craigo,
266 N.C. 92, 145 S.E.2d 376 (1965) 8

Ford v. Ford
371 U.S. 187, 83 S.Ct. 273, 9 L.Ed. 240 (1962) 10

Fortson v. Fortson,
195 Ga. 750, 25 S.E.2d 518 (1943) 8

Halvey v. Halvey,
320 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947) . . . 10

Hardee v. Mitchell,
230 N.C. 40, 51 S.E.2d 884 (1949) 8

Holmes v. Holmes,
211 Ga. 827, 89 S.E.2d 194 (1955) 8

Shepherd v. Shepherd,
273 N.C. 71, 159 S.E.2d 337 (1968) 8

Page

Thomas v. Thomas,
259 N.C. 461, 130 S.E.2d 871 (1963) 8

Wilson v. Wilson.
269 N.C. 676, 153 S.E.2d 349 (1967) 8

Statutes:

N.C.G.S. 50-13.7 (1967) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-910

RICHARD T. SPENCE and wife, FRANCES HAWKINS SPENCE, and RONALD KENNETH SPENCE,

Petitioners,

v.

SUSAN DURHAM SPENCE, JAMES ROBERT DURHAM and wife, FAYE MUNDY DURHAM,

Respondents.

Petition for Writ of Certiorari to The Supreme Court of North Carolina

---

BRIEF FOR RESPONDENT, SUSAN DURHAM SPENCE, IN OPPOSITION

JURISDICTION

The respondents respectfully contend that the petitioners have not demonstrated sufficient facts to invoke the jurisdiction of this Court. The final order and judgment in the case was rendered in the Forsyth County,

North Carolina District Court on the 11th day of January, 1972. The petitioners herein filed an appeal to the North Carolina Court of Appeals, which reversed the judgment of the Forsyth County District Court on October 25, 1972. On November 16, 1972, the respondent, Susan Durham Spence, filed notice of appeal to the Supreme Court of North Carolina on the grounds that a substantial constitutional question was involved in the case. In the alternative, the respondent filed a petition for certiorari to review the decision of the North Carolina Court of Appeals. On November 24, 1972, the petitioners, Ronald Kenneth Spence, Richard T. Spence, and Frances Hawkins Spence, filed a motion in the Supreme Court of North Carolina to dismiss the appeal of Susan Durham Spence on the grounds that the case did not involve a substantial constitutional question. The Supreme Court of North Carolina thereafter granted Certiorari and on the 31st day of August, 1973, reversed the decision of the Court of Appeals, thereby reinstating and affirming the judgment of the Forsyth County, North Carolina District Court.

QUESTION PRESENTED

In a child custody proceeding, wherein both North Carolina and Georgia permit modification of a prior custody decree upon a showing of a substantial change in circumstances, and the North Carolina trial Court found a substantial change in circumstances since the entry of the 1969 Georgia decree, which ruling was affirmed by the North Carolina Supreme Court on certiorari to the North Carolina Court of Appeals, may the party who moved to dismiss an appeal as of right to the North Carolina Supreme Court for lack of a constitutional issue, thereafter invoke the jurisdiction of the United States Supreme

Court to review the North Carolina proceedings, by asserting that the North Carolina courts unconstitutionally refused to give the Georgia decree full faith and credit?

CONSTITUTIONAL PROVISIONS

The respondent, Susan Durham Spence, respectfully contends that no constitutional questions are involved in view of the finding of change in circumstances, and that the petitions have not demonstrated sufficient facts to invoke the jurisdiction of this Court.

STATEMENT OF CASE

Susan Durham Spence instituted a civil action in the District Court of Forsyth County, North Carolina, for the custody of her two minor children, Fay Frances Spence (age 8) and Dianna Jeannene Spence (age 6). In June of 1969, she and her husband, Ronald K. Spence, had entered into a "consent agreement", which was filed in the Superior Court of Cobb County, Georgia, under threat that unless the agreement was signed, Mrs. Spence would be denied the right to see the children. No witnesses were called in the Georgia proceeding, which awarded custody to the paternal grandparents during the summer and the maternal grandparents during the remainder of the year. The father, Ronald K. Spence, was relieved of any obligation to support the children. Subsequent to the parties' divorce, Mr. Spence remarried and Mrs. Spence moved to Winston-Salem, North Carolina.

Following several continuances at the request of Ronald Spence, the North Carolina custody action came on for hearing in the Forsyth County District Court before

the Honorable John C. Clifford. After four full days of hearings, Judge Clifford entered an order in which he found, *inter alia*, that substantial changes in circumstances had occurred so as to warrant modification of the Georgia order. The changed conditions found as facts by Judge Clifford may be summarized as follows:

> "1. The defendant Spence stated in open Court that it is their contention that at the time of the entry of the document in Cobb County on June 2, 1969, that Susan Durham Spence was not a fit and proper person to have custody of Fay and Dianna. If that be the case and the justification for the entry of the June 2, 1969, instrument, then that condition has substantially changed in that Susan Durham Spence is now a fit and proper person to have the custody of her children.
>
> 2. At the time of the entry of the June 2, 1969, document, Susan Durham Spence was highly emotional as well she should have been since her children were taken from her without her knowledge or consent on January 9, 1969, and since that date she had never been allowed to have her children in her care and custody alone. Today Susan Durham Spence is a well-adjusted emotionally stable individual fully capable of caring for and rearing Fay and Dianna.
>
> 3. Fay and Dianna are now older and at an age when they need the care, love and attention of their mother. On June 2, 1969, this was not as crucial to their well-being as it is today.

4. The grandparents Spence and Durham are not as able to respond to the daily needs of these two small girls as they were on June 2, 1969; J.R. Durham is in ill health at the present time; and, the burden of the financial support and care and custody of Fay and Dianna should not now be imposed on the grandparents.

5. Ronald Kenneth Spence has, since the entry of the June 2, 1969, document, become the father of an illegitimate child, remarried, become the father of a legitimate child and moved to the State of Kansas where he is unemployed, has no income from any source, and is living off the accounts receivable of his present wife, who is also unemployed.

6. Fay and Dianna have been in the sole and exclusive custody of their mother since July of 1971, a period of five (5) months.

7. Susan Durham Spence now has an established profession and home in this community where she is more than able to adequately care for the needs of the two children. Her routine and schedule of work here is such that she can be with the children almost all times when they are not actually in school.

The petitioners appealed the Order of Judge Clifford to the North Carolina Court of Appeals, which held that the trial court correctly concluded that, even if the Georgia decree was entitled to full faith and credit, the North Carolina courts had jurisdiction to modify the prior order when the children were physically present in the State and a showing of changed circumstances is made. Nevertheless,

the North Carolina Court of Appeals held that the evidence did not support the findings and that the findings did not support the judgment, and thus, reversed the trial court.

On November 16, 1972, Susan Durham Spence, gave Notice of Appeal to the North Carolina Supreme Court, pursuant to the provisions of G.S. 7A-30, which provides in pertinent part that a party may appeal a decision of the Court of Appeals as a matter of right when the decision directly involves a substantial question arising under the Constitution of the United States or North Carolina.

On November 24, 1972, the petitioners filed a motion in the North Carolina Supreme Court, entitled "MOTION TO DISMISS APPEAL FOR LACK OF A SUBSTANTIAL CONSTITUTIONAL QUESTION." In that motion, the petitioners contended that "this case does not involve a substantial constitutional question. . . ." Mrs. Spence had also filed a Petition for Writ of Certiorari in the North Carolina Supreme Court to review the decision of the North Carolina Court of Appeals, on grounds that the case involved legal principles of major significance to the jurisprudence of North Carolina and had significant public interest so as to warrant discretionary review.

By order dated January 2, 1973, the North Carolina Supreme Court issued a Writ of Certiorari to the North Carolina Court of Appeals to review its decision. On January 2, 1973, the Supreme Court of North Carolina ruled that the motion to dismiss Mrs. Spence's purported appeal for lack of a substantial constitutional issue was rendered moot by the issuance of a Writ of Certiorari to the Court of Appeals.

In reversing the Court of Appeals and affirming the ruling of the trial Court awarding custody to Mrs. Spence,

the Supreme Court stated that North Carolina courts "will accord full faith and credit to the custody decree of a sister state which had jurisdiction of the parties and the cause as long as the circumstances attending its rendition remain unchanged." The North Carolina Supreme Court held that the evidence fully supported the findings and judgment, and noted that in view of the changed circumstances, it was not necessary to consider the question of full faith and credit.

From the adverse decision of the North Carolina Supreme Court, the petitioners seek a Writ of Certiorari from this Court on the grounds that this case involves substantial constitutional issues.

ARGUMENT

THE NORTH CAROLINA COURTS DID NOT DENY THE GEORGIA DECREE FULL FAITH AND CREDIT, AND THE PETITIONERS SHOULD NOT BE PERMITTED TO INVOKE THE CONSTITUTIONAL JURISDICTION OF THIS COURT AFTER PREVIOUSLY ASSERTING THAT THIS CASE INVOLVED NO SUBSTANTIAL CONSTITUTIONAL ISSUES, IN LIGHT OF THE FINDING OF CHANGED CIRCUMSTANCES.

As noted by Justice Sharp in the opinion of the North Carolina Supreme Court in this case (Petitioners' Appendix, p. 34a):

> "In both Georgia and North Carolina, a decree awarding the custody of minor children determines only the present rights of the parties under the conditions then existing; it is not permanent in its nature and is subject to judicial alteration or modification upon any

> change of circumstances substantially affecting the welfare of the children. *Shepherd v. Shepherd*, 273 N.C. 71, 159 S.E.2d 357 (1968); *Wilson v. Wilson*, 269 N.C. 676, 153 S.E.2d 349 (1967); *Thomas v. Thomas*, 259 N.C. 461. 130 S.E.2d 871 (1963); *Hardee v. Mitchell*, 230 N.C. 40, 51 S.E.2d 884 (1949); *Holmes v. Holmes*, 211 Ga. 827, 89 S.E.2d 194 (1955), *Fortson v. Fortson*, 195 Ga. 750, 25 S.E.2d 518 (1943). The rule is that the welfare of the child whose custody is in controversey is 'the polar star by which the courts must be guided in awarding custody.' "

In *In Re Craigo*, 266 N.C. 92, 145 S.E.2d 376 (1965), the North Carolina Supreme Court observed:

> "The constitutional provisions Articles IV, Sec. 1, requiring full faith and credit to be given to judicial proceedings in sister states did not require North Carolina to treat as final and conclusive an order of a sister state ordering custody of a minor when the courts of the state making the award can subsequently modify the order or decree."

The law of the State of Georgia permits modification of a custody decree upon a showing of substantial change in conditions. *Holmes v. Holmes*, 211 Ga. 827, 89 S.E.2d 194 (1955). Furthermore, N.C.G.S. 50-13.7 (1967) specifically provides:

> "When an order for custody or support of a minor child has been entered by a court of another state, a court of this state may, upon gaining jurisdiction and upon a showing of

> changed circumstances, enter a new order for support or custody which modifies or supersedes such order for custody or support."

Both the decision of the North Carolina Supreme Court and that of the North Carolina Court of Appeals, in the case at bar, plainly stated that North Carolina courts will give full faith and credit to the custody decree of a sister state which had jurisdiction of the parties and the cause, as long as the circumstances attending its rendition remain unchanged. Both courts in fact extended full faith and credit to the 1969 Georgia decree relied on by the petitioners. The basis for the decision awarding custody to Susan Spence was not the denial of full faith and credit, but the express finding of substantial change in circumstances occurring since the entry of the Georgia order. The petitioners clearly have not been deprived of any constitutional rights and privileges as a result of the North Carolina proceedings, which afforded full faith and credit to the Georgia order on which they relied. Indeed, the petitioners strongly contended in the North Carolina Supreme Court, in their motion to dismiss the appeal of Mrs. Spence, that this case involves no substantial constitutional questions. Now they contend to the contrary.

The appellate courts of North Carolina properly limited the issues in this case to the question of whether or not the evidence supported the trial court's findings that a substantial change in circumstances had occurred since entry of the Georgia decree. The exhaustive review of the evidence by the North Carolina Supreme Court demonstrates that the trial judge correctly modified the Georgia decree on the basis of the changed conditions since 1969.

The Supreme Court of the United States has specifically held that where the court of one state is empowered

to alter its own custody decree upon a showing of a change in circumstances affecting the question, the courts of another state may also modify it upon the same grounds. *Ford v. Ford*, 371 U.S. 18, 835 S.Ct. 273, 9 L.Ed. 240 (1962); *Kovacs v. Brewer*, 356 U.S. 604, 78 S.Ct. 963, 2 L.Ed.2d 1008 (1958); *Halvey v. Halvey*, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947). Since the Georgia Court could alter its decree upon a showing of a change in circumstances adversely affecting the children no question of the right of the North Carolina court to do so can arise.

It is respectfully submitted that the ruling of the North Carolina Supreme Court is correct and does not warrant review by this Court. The trial judge diligently and responsibly performed his duty, as that duty is delineated by Justice Frankfurter in his dissent to *Kovacs v. Brewer*, 356 U.S. 604, 614, 78 Sup. Ct. 963, 968 (1958):

> "Because the child's welfare is the controlling guide in a custody determination, a custody decree is of an essentially transitory nature. The passage of a relatively short period of time may work great changes, although difficult of ascertainment, in the needs of a developing child. Subtle, almost imperceptible, changes in the fitness and adaptability of custodians to provide for such needs may develop with corresponding rapidity. A court that is called upon to determine to whom and under what circumstances custody of an infant will be granted cannot, if it is to perform its function responsibly, be bound by a prior decree of another court, irrespective of whether 'changes in circumstances' are objectively provable. To say this is not to say

that a court should pay no attention to a prior decree or to the STATUS QUO established by it. These are, of course, among the relevant and even important circumstances that a court should consider when exercising a judgment on what the welfare of a child before it requires."

CONCLUSION

The respondent, Susan Durham Spence, sincerely believes that the North Carolina Supreme Court properly upheld the findings of the trial judge awarding her custody of her two minor children, upon the grounds of a substantial change in circumstances occurring since the entry of the 1969 Georgia decree. The petitioners have clearly failed to show the existence of a constitutional issue necessary to the resolution of this case. They should not now be heard to complain, when they have previously asserted the lack of any substantial constitutional issue in this case. The petition for Writ of Certiorari should be denied, to the end that the Order of the District Court of Forsyth County, North Carolina, may be duly enforced.

Respectfully submitted,

NORWOOD ROBINSON

Hudson, Petree, Stockton, Stockton and Robinson

610 Reynolds Building
Winston-Salem, North Carolina 27101

FRED G. CRUMPLER, JR.
MICHAEL J. LEWIS

White and Crumpler

2616 Wachovia Building
Winston-Salem, North Carolina 27101

Counsel for Respondent, Susan Durham Spence